TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1903~~ 1904.

No. ~~270~~ 32.

W. O. JOHNSON, PETITIONER,

vs.

SOUTHERN PACIFIC COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FOR CERTIORARI, FILED MAY 16, 1904.
CERTIORARI AND RETURN, FILED JULY 12, 1904.

(18929.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 279.

W. O. JOHNSON, PETITIONER,

vs.

SOUTHERN PACIFIC COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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a UNITED STATES OF AMERICA, ss:

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the eighth circuit, greeting:

Being informed that there is now pending before you a suit in which W. O. Johnson is plaintiff in error and Southern Pacific Company is defendant in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the district of Utah, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the

b Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the honorable Melville W. Fuller, Chief Justice of the United States, the third day of June, in the year of our Lord one thousand nine hundred and three.

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

RETURN TO WRIT.

UNITED STATES OF AMERICA,
Eighth circuit, ss:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same (except the proceedings and papers filed on the writ of error from the Supreme Court).

In witness whereof I hereto subscribe my name and affix the seal of the United States circuit court of appeals for the eighth circuit, at office in the city of St. Louis, Missouri, this eleventh day of July, A. D. 1903.

[SEAL.] JOHN D. JORDAN,
Clerk of the United States circuit court of appeals for the eighth circuit.

c (Indorsed:) File No. 18929. Supreme Court of the United States. No. 279, October term, 1903. W. O. Johnson *vs.* Southern Pacific Company. Writ of certiorari. Filed June 8, 1903. John D. Jordan, clerk.

d Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at the May term, 1902, of said court, begun and held at the United States court-house in the city of St. Paul, Minnesota, on the first Monday in May, to wit, the fifth day of May, A. D. 1902, before the honorable Walter H. Sanborn and honorable Amos M. Thayer, circuit judges, and honorable William Lochren, district judge.

Attest:

[SEAL.] JOHN D. JORDAN,
Clerk of the United States circuit court of appeals for the eighth circuit.

Be it remembered that heretofore, to wit, on the twentieth day of February, A. D. 1902, a transcript of record, in pursuance to a writ of error directed to the circuit court of the United States for the district of Utah, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, wherein W. O. Johnson was plaintiff in error and the Southern Pacific Company was defendant in error, which said transcript of record is in the words and figures following, to wit:

1 UNITED STATES OF AMERICA,
District of Utah, ss:

At a stated term of the United States circuit court, begun and held at the building used as an United States court-house in the city of Salt Lake, in said district, on the first Monday, being the 2nd day of December, in the year of our Lord one thousand nine hundred and one, and of the Independence of the United States of America the one hundred and twenty-sixth year.

Present: Honorable John A. Marshall, United States district judge for the district of Utah.

Transcript of the record.

W. O. JOHNSON, PLAINTIFF,
vs.
SOUTHERN PACIFIC COMPANY, A CORPORATION, defendant.

Complaint.

Be it remembered that heretofore and on the 6th day of October, 1900, said plaintiff filed his complaint in the first judicial district court of the State of Utah in and for Box Elder County, which, being entitled therein and in this cause, is in words and figures following, to wit:

Plaintiff complains of the defendant and for cause thereof alleges—

1. That defendant is a corporation organized and existing under and by virtue of the laws of the State of Kentucky, and at all the times hereinafter mentioned was and is engaged in operating a railroad between the city of San Francisco, State of California, and the city of Ogden, State of Utah, and at all of said times was and is a common carrier, engaged in interstate commerce by railroad, and was, on the fifth day of August, 1900, hauling and using on its line a certain locomotive engine, hereinafter more fully described, used in moving interstate traffic.

2. That on the fifth day of August, 1900, in the day time thereof, the said plaintiff, W. O. Johnson, was acting as head brakeman upon a freight train, composed of freight cars and a locomotive engine, above mentioned, of the said company, said engine at the said time being used in moving interstate traffic, and whilst the said plaintiff was in the employ
2 of the said company, as aforesaid, the said freight train upon which said plaintiff was working ran into the town of Promontory, in Box Elder County, State of Utah, and thereupon the defendant company ordered and directed the said plaintiff to uncouple the said

engine from the said train upon which the plaintiff was working, which he did accordingly, and to couple the said engine onto a certain dining car, also used in moving interstate traffic, which was standing at the time above mentioned in the yards of the said company in the said town of Promontory.

3. That the said engine was equipped with what is commonly known as a Jenney coupler, and that the said dining car was equipped with what is commonly known as a Miller hook, which two distinct kinds of couplers were not couplers which, acting together, would couple automatically by impact, and therefore had to be coupled by hand by a person passing between the ends of said car and engine and uniting the same by means of a link and pin.

4. That it was the duty of said defendant company to furnish its cars and locomotives with coupling appliances automatic in their character and which would and should couple automatically by impact, and not necessitating the brakeman of said company going between the cars to couple the same, all of which defendant company well knew, as also the condition of said cars in that respect, and is hereinafter set out, and said defendant company negligently and carelessly used, operated, and maintained the said locomotive and car in such condition for a long period of time before said accident, by reason of which negligence and carelessness plaintiff was injured, as herein set out.

5. That the said defendant company ordered and directed the said plaintiff to couple the said engine to said dining car, as aforesaid, and in order to do so he was obliged to use a link and pin and pass in between the said dining car and said moving engine, which he did, and while endeavoring to couple together the said engine and dining car with such link and pin, with all due care and without any fault or negligence on his part, his left arm and hand was caught between the said couplers and ends of said dining car and moving engine, thereby bruising and crushing the same and rendering it useless and diseased and necessitating the amputation of said hand and forearm.

6. That the said Miller hook on said dining car was out of order, in that it did not project in a straight line from under the center of the said dining car, which fact made it more difficult and more dangerous
3 to effect a coupling between the said car and engine than it would otherwise have been, and that said company knew or with reasonable diligence and care could have known that said Miller Hook was out of repair, and that the said plaintiff did not know that the same was out of order nor had he any means of obtaining said knowledge.

7. That at the time of the injury the plaintiff was a strong, healthy, able-bodied man of the age of thirty-three years, and earning $90 per month.

8. That by reason of the injury as above described he was in the hospital two months, and lost the use of his said hand and forearm and suffered great bodily and mental suffering and expense, and with a likelihood of further expense and suffering by having to undergo another amputation of the arm on account of its shattered condition.

9. That by the said wrongful act of the said defendant the said pl intiff is rendered a cripple for life and is unable to perform manual labor, and he has suffered damage thereby in the sum of $20,000.

Wherefore plaintiff demands judgment for the sum of $20,000 and for costs of this suit and for such other and further relief as to the court may seem just.

W. L. MAGINNIS,
Attorney for Plaintiff.

STATE OF UTAH,
County of Weber, ss:

I, W. O. Johnson, after having been first duly sworn on oath, say as follows:

That I am the plaintiff in the above-entitled action and have read the foregoing complaint and know the contents thereof, and that the same is true to my own knowledge except as to matters therein stated upon information and belief, and as to those matters I believe it to be true.

W. O. JOHNSON.

Subscribed and sworn to before me this 3rd day of October, 1900.

[SEAL.] E. S. ROLAPP,
Notary Public.

(Indorsements:) No. 371. Title court and cause. Complaint. Filed October 6th, 1900. Geo. L. Graehl, clerk. Filed Nov. 27, 1900, Jerrold R. Letcher, clerk.

And afterwards and on the 30th day of October, 1900, said defendant filed in said State court its petition for removal to the
4 United States circuit court for the district of Utah, central division, which being entitled therein and in this cause, is in words and figures following, to wit:

Petition for removal to the United States circuit court, district of Utah, central division.

To the honorable, the first judicial district court of the State of Utah, in and for the county of Box Elder:

Your petitioner respectfully shows that it is the defendant in the above-entitled action; that it is not a resident or a citizen of the State of Utah, but is a citizen of the State of Kentucky, wherein this defendant was duly incorporated as a corporation; that the matter and amount in dispute in this suit exceeds, exclusive of interest and costs, the sum of $2,000.00; that said suit is of a civil nature, being an action brought by plaintiff against said defendant to recover the sum of $20,000.00 damages for wrongs and injuries inflicted on the plaintiff on or about August 5th, 1900, near Promontory, in Box Elder County, State of Utah, through the alleged carelessness and negligence of the defendant while said plaintiff was in the employ of the defendant as head brakeman on a freight train, all of which will more fully appear by reference to the verified complaint on file herein, to which reference is hereby made; that the controversy in said suit is wholly between citizens of different States, to wit, between your petitioner, who was at the time of the bringing of this suit and at this time is a citizen and resident of the State of Kentucky, wherein and whereby and under the laws of which State it

was duly incorporated. That said plaintiff is a resident of the State of Utah, and was such at the time of the institution of this suit and now is a citizen and resident of the State of Utah; that your petitioner offers herewith a bond, with good and sufficient sureties for the entering in the circuit court of the United States (central division) for the district of Utah, on the first day of its next session, a copy of the record in this suit, together with all files, papers, and pleadings filed herein, and for all costs that may be awarded by said circuit court, if said court shall hold that this suit was wrongfully and improperly removed thereto.

Your petitioner prays this honorable court to proceed to further herein, except to make an order for the removal of said cause to the said circuit court of the United States, and to accept the said sureties and bond and to cause the record herein, together with all files and papers herein, to be removed to said circuit court; and your petitioner will ever pray.

MARSHALL, ROYLE & HEMPSTEAD.
Attorneys for said Petitioner.

5 STATE OF UTAH,
County of Salt Lake, ss:

Thomas Marshall, being first duly sworn, deposes and says: That he is one of the attorneys of the above-named petitioner; that he has read the foregoing petition and knows the contents thereof and the said allegations therein contained are true, as he verily believes.

THOMAS MARSHALL.

Subscribed and sworn to before me this 26 day of Oct., 1900.

[SEAL.] LULA GEOGHEGAN,
Notary Public.

(Indorsements:) No. 371. Title, cause, and court. Petition for removal, etc. Filed Oct. 30", 1900. Geo. L. Graehl, clerk. Filed Nov. 27, 1900. Jerrold R. Letcher, clerk.

Bond for removal.

And afterwards, and on the same day, said defendant filed in said State court its bond on removal to the United States circuit court for the district of Utah, which, being entitled therein and in this cause, is in words and figures following, to wit:

Know all men by these presents: That the Southern Pacific Company as principal, and John E. Dooly and Harry T. Duke as sureties, are held and firmly bound unto W. O. Johnson in the sum of $500.00, to the payment of which well and truly to be made, we jointly and severally bind ourselves, our representatives, heirs, and assigns by these presents. Signed this 26 day of October, 1900.

The condition of the above obligation is such that: Whereas said W. O. Johnson has commenced an action in the district court of the first judicial district of the State of Utah, county of Box Elder, against the Southern Pacific Company, to recover the sum of $20,000.00 damages for injuries and wrongs alleged to have been done to plaintiff while employed as a brakeman by the said defendant, at or near Promontory, on the line of defendant's road in the county of Box Elder, State of

Utah, on or about the 5th day of August, 1900, while said plaintiff was engaged as an employee of said defendant on one of its trains by the carelessness and negligence of the said defendant, all of which will more fully appear by reference to the complaint of plaintiff now on file in this court; that said defendant has filed its petition for removal of said action to the circuit court of the United States (central division) for the district of Utah.

6 Now, therefore, if the said defendant shall enter and file, or cause to be entered and filed in said circuit court of the United States, a copy of the record in said case, including all the files and pleadings now on file in said cause, on or before the first day of the next session thereof, and shall pay all costs that may be awarded by said circuit court, if said court shall hold that this suit was wrongfully and improperly removed thereto, and shall further appear and give special bail in said suit, if the same was originally requisite in said cause, and shall do such other and proper acts as may be requisite to be done on the removal of said cause, then this obligation shall be void; otherwise, in full force and effect.

SOUTHERN PACIFIC COMPANY,
By THOMAS MARSHALL, *its Attorney.*
JOHN E. DOOLY,
HARRY T. DUKE, *as Sureties.*

STATE OF UTAH,
County of Salt Lake, ss:

John E. Dooly and Harry T. Duke, of the said county, sureties named in the foregoing bond, being duly sworn, each for himself, says: I am a resident of the State of Utah, and a property holder therein, and am worth the sum of $500.00 over and above my debts and liabilities, exclusive of property by law exempt from execution; that I have property in the State of Utah liable to execution of the value of more than $500.00.

JOHN E. DOOLY.
HARRY T. DUKE.

Subscribed in my presence by John E. Dooly and Harry T. Duke, and by them severally sworn to before me this 26 day of October, 1900.

[SEAL.] LULA GEOGHEGAN.

The foregoing bond is hereby approved.

CHAS. H. HART, *Judge.*

BRIGHAM CITY, *Nov. 14th, 1900.*

(Indorsements:) No. 371. Title, court, and cause. Bond for removal. Filed October 30th, 1900. Geo. L. Graehl, clerk. Filed Nov. 27, 1900. Jerrold R. Letcher, clerk.

Order for removal.

And afterwards, and on the 30th day of October, 1900, said defendant filed in said State court its order for removal, which, being entitled therein and in this cause, is in words and figures following, to wit:

7 The defendant herein having within the time provided by law filed its petition for the removal of this cause to the circuit court

of the United States (central division) for the district of Utah, and having at the same time offered its bond in the sum of $500.00, with John E. Dooly and Harry T. Duke, good and sufficient sureties, pursuant to the statute and conditioned according to law;

Now, therefore, this court does hereby accept and approve of said bond, and accept said petition, and it is ordered that this case be removed for trial to the circuit court of the United States (central division) for the district of Utah, pursuant to the statute of the United States, and that all further proceedings of this court be [staid].

Dated this 13th day of November, 1900.

CHAS. H. HART, *Judge.*

(Indorsements:) No. 371. Title court and cause. Order for removal. Filed October 30th, 1900. Geo. L. Graehl, clerk. Filed Nov. 27, 1900. Jerrold R. Letcher, clerk.

Clerk's certificate on removal.

And afterwards and on the 14th day of November, 1900, the clerk of said district court attached the following certificate to the papers in this cause, which being entitled in said district court and in this cause is in the words and figures following:

STATE OF UTAH,
County of Box Elder, ss:

I, George L. Graehl, county clerk of Box Elder County, Utah, and ex officio clerk of the district court of the first judicial district in and for the county of Box Elder, State of Utah, do hereby certify that the foregoing papers hereunto attached are the original complaint, petition for removal, order for removal, bond for removal, and summons, which comprises all the papers in the above-entitled action as the same appears on record in my office.

Witness my hand and the seal of said district court this 14th day of November, A. D. 1900.

[SEAL.] GEO. L. GRAEHL,
Clerk of District Court.

(Indorsements:) 388. Filed Nov. 27, 1900. Jerrold R. Letcher, clerk.

And thereupon, and on the 27th day of November, 1900, said papers on removal were filed in and said action duly entered upon the register of actions of said United States circuit court.

8 *Answer.*

And afterwards and on the 11th day of December, 1900, said defendant filed its answer to said complaint, in this court, which being entitled therein and in this cause, is in words and figures following, to wit:

Now comes said defendant and makes this its answer to the complaint of plaintiff, first filed in the district court of the first judicial district in and for Box Elder County, in the State of Utah, and subsequently transferred to and now pending in the above-entitled court.

Defendant admits the first subdivision of plaintiff's complaint, but denies that at the time of the alleged injuries to plaintiff on said fifth day of August, A. D. 1900, said locomotive engine was being used in moving interstate traffic.

Defendant admits that on the fifth day of August, 1900, plaintiff was acting as head brakeman upon a freight train, composed of freight cars and a locomotive engine of said company, which, at and prior to its arrival at said Promontory, was being used in moving interstate commerce, and that on arriving at Promontory plaintiff was ordered and directed to uncouple the said engine from said train, which he did accordingly, and subject to the rules and regulations of defendant was directed to couple the said engine onto a certain dining car, which was standing at the time in the yard of said company in said town of Promontory; but this defendant denies that on said fifth day of August, or at the time of the alleged injuries to plaintiff, said dining car was being used in moving interstate traffic.

Defendant admits the third subdivision of said complaint.

Defendant denies that as applied to said engine after it was parted from said freight train, and said dining car standing in the yards of defendant at Promontory, and at the time said alleged coupling was attempted, it was the duty of said defendant at or prior to said attempted coupling to furnish said dining car with a coupling appliance, automatic in its character, or which should couple automatically by impact, not necessitating the brakeman going between the cars to couple the same; or that defendant well knew the same, or knew that said dining car had not a reasonably safe and satisfactory coupler upon the end thereof that was to be coupled, or that defendant negligently or carelessly used or operated said dining car then standing in the yards of said company, or that by reason thereof said plaintiff was injured as alleged in said complaint.

9 Defendant admits that in ignorance of the condition of said dining car it ordered or directed said plaintiff to couple said engine to said dining car, but that plaintiff well knew that it was his duty nevertheless to examine the couplings upon the engine and the dining car, and if the same were defective, not to obey such order but report the same to the conductor or yardmaster.

Defendant denies that when plaintiff was ordered to couple said cars, the couplings of which were defective, it was his duty or he was obliged to make said coupling, or to use a link or pin, or pass in between the said dining car and said moving engine, or that while endeavoring to couple together the said engine and dining car with link or pin, or with due care, or without any fault or negligence on his part, his left arm or hand was caught between the said couplers or ends of said dining car or moving engine, thereby or by reason thereof bruising or crushing the same, or rendering it useless or diseased, or necessitating the amputation of said hand or forearm.

Defendant denies that at the time of said alleged attempt at coupling it knew, or with reasonable diligence or care it could have known, of said Miller hook, or that said Miller hook was out of repair; and this defendant alleges that it could only know of such defects or want of repair through its employees who did coupling, and it was their duty, as

it was the duty of plaintiff, in case of any such defects as alleged, not to make the coupling, but to report such defects to defendant.

Defendant denies that plaintiff did not know, nor had any means of obtaining knowledge, that said couplings were out of order. On the contrary defendant alleges that before attempting to make such coupling it was plaintiff's duty to examine said couplings to see if they were in good order, to take sufficient time so to do, and in case they were defective to run no risk, but report such defects to defendant.

As to whether or not, at the time of said injury to plaintiff, he was a strong, healthy, or able-bodied man, defendant has no knowledge or information thereof sufficient to form a belief, and therefore denies the same.

Defendant denies that by reason of any negligence or want of due care on the part of defendant, as alleged in said complaint, or by reason of plaintiff's injuries as described in said complaint, plaintiff was in the hospital two months, or lost the use of his said hand or forearm, or suffered great bodily or mental suffering or expense, or with a lik'lihood of further expense or suffering by having to undergo another amputation of the arm on account of its shattered condition.

Defendant denies that by the said alleged wrongful act or acts of defendant the said plaintiff is rendered a cripple for life, or is unable to perform manual labor, or has suffered damage thereby in the sum of twenty thousand dollars or in any sum whatever.

And for a further and separate answer to said complaint defendant alleges that prior to the said 5th day of August, 1900, said plaintiff had been in the employ of defendant for about six years, about two years as engine wiper, about two years as fireman, and about two years as brakeman upon its said road. That in all these positions, especially in the two last named, the printed rules and regulations of defendant in its operating department on its said road were furnished to and received by said plaintiff, and the rules and regulations in force at the time of the alleged injury to plaintiff on August 5th, 1900, had, prior to that time, been furnished to plaintiff and he knew and was familiar with said rules. That by these rules it was among other things provided, in reference to employees on defendant's said road, and as governing said plaintiff, as one of its said employees, that "Employees are required to be conversant with and obey the rules and special instructions." "If in doubt as to their meaning they must apply to the proper authority for an explanation." Also the following: "Persons employed in any service on trains are subject to the rules." Also the following: "Great care must be exercised by all persons when coupling cars. Inasmuch as the couplers of cars and engines cannot be uniform in style or strength, and are liable to be broken from various causes so as to render it dangerous to expose the hands, arms, or persons of those engaged in making couplings, all employees are enjoined before coupling cars or engines to examine and to know the kind and condition of the drawhead, drawbar, link-and-coupling apparatus, and are forbidden to place in trains any car with a defective coupling until they shall have reported the defect to the conductor or yardmaster. Sufficient time may be taken by employees in all cases to make the examination required."

That on said 5th day of August, 1900, said dining car was, and had been, standing still and alone in the yards of defendant at said town of

Promontory, and the engine of the freight train was moving towards it to be coupled thereto and to turn said dining car about upon a turntable. That plaintiff had ample opportunity to examine and know, and he did know, the condition of the coupler upon said dining car before
11 attempting to couple the same to said engine, and it then and there under said rules became his duty not to make said coupling, but to report the defects in the dining-car coupling to the conductor or yardmaster of defendant. But said plaintiff disregarding his said duty wilfully, carelessly, and negligently failed to report said defective coupler to said conductor or yardmaster, and in defiance of said rules and his said duty in the premises wilfully, carelessly, and negligently attempted to make said coupling, and thereby, without any fault or negligence of defendant therein, suffered the wrongs and injuries complained of by him.

And for a further and separate answer to said complaint defendant alleges: That defendant was a corporation at the time of said alleged injury to plaintiff, and also in the usual operation of trains on its said road and could only know of defects in the coupling apparatus of its cars and trains through the persons who used and operated these couplings, especially the brakeman who usually assisted in making couplings; and defendant was compelled to rely upon these persons as to defects in couplings which required mending or replacing. That plaintiff had, prior to his said injuries, been employed upon the line of defendant's road about six years, for about four years of which time he was acting as fireman or brakeman, and as brakeman he was thoroughly familiar with his duty in coupling cars. That he knew the rules of said defendant hereinbefore in this answer to said complaint quoted, and knew of the defects in the coupler of the dining car, and knew the danger he ran in trying to couple the engine and the dining car, and so knowing, and in violation of his duty to defendant he wilfully and carelessly assumed the risk of attempting to make such coupling, and thereby, without any negligence or carelessness by defendant therein, suffered the injuries complained of by him.

MARSHALL, ROYLE & HEMPSTEAD,
Attorneys for Defendant.

STATE OF UTAH,
County of Salt Lake, ss:

Thomas Marshall, having been first duly sworn upon his oath, says: I am one of the attorneys for said defendant in the above-entitled action. I have read the foregoing answer and know the contents thereof, and the same is true of my own knowledge except as to the matters therein stated on information and belief, and as to those matters I believe it to be true, and the same is true to my best knowledge, information, and belief. My knowledge, information, and belief are derived from
12 documents, information, and evidence furnished me by said defendant. This verification is made by me, because defendant is a corporation and I am one of its attorneys in said action, and also the duly authorized agent of defendant in the State of Utah upon whom all legal process in said State can be served.

THOMAS MARSHALL.

Subscribed and sworn to before the undersigned notary public in and for said county of Salt Lake this the 11 day of December, A. D. 1900, as witness my hand and my notarial seal.

[SEAL.] LULA GEOGHEGAN,
Notary Public.

STATE OF UTAH,
County of Salt Lake, ss:

I, Thomas Marshall, of counsel for defendant, hereby certify that in my opinion the foregoing answer, and the defense therein set forth, is well founded in point of law.

THOMAS MARSHALL.

Filed December 11, 1900. Jerrold R. Letcher, clerk.

Order trial begun.

And afterwards and on June 28, 1901, the same being one of the regular juridical days of the May term, 1901, of this court, the following order, entitled in this cause, made and entered in the minute book, to wit:

At this day comes said plaintiff, by William L. Maginnis, his attorney, and the said defendant, by Thomas Marshall and J. C. Royle, its attorneys, also comes. And thereupon comes a jury, to wit: W. F. Critchlow, John McNeal, C. D. Tyree, W. G. Smith, J. H. Moulton, George Beard, Henry T. Knowles, James Nolan, Thomas C. Griggs, David S. Tracy, Henry T. McEwan, and Peter Sutton, twelve good and lawful men, and they are duly selected and tried, empaneled and sworn to well and truly try the matter at issue herein joined, and a true verdict give according to the evidence. And W. O. Johnson and T. F. Rowland, are sworn and examined as witnesses on the part of said plaintiff. And thereupon by consent of said parties in open court, it is ordered that D. S. Tracy, one of the jurors on this case, be excused from further service herein, and that the further trial be had with eleven jurors. And the hour of adjournment having been reached, the further trial of this action is postponed until to-morrow morning at the hour of ten o'clock. And said jurors being now here by the court duly admonished and cautioned as to their duties as jurors during the adjournment of the court, are permitted to separate to meet the court as aforesaid.

13 And afterwards, and on the 29th day of June, 1901, of the May term, the same being one of the regular juridical days of said May term, the following proceedings were had, which being entitled in this cause, are in words and figures, to wit:

At this day come again said parties, by their respective attorneys as aforesaid. And said jurors being now all here present and in the jury box, the trial of this action is resumed, and S. C. Slaughter and W. O. Johnson are examined as witnesses on the part of plaintiff, which concluded the evidence of plaintiff. Whereupon said defendant rests its case and moves the court to peremptorily instruct the jury to return a verdict in its favor, and the court having heard the arguments of counsel, and being well advised in the premises, sustains said motion, and so

instructs said jurors, and said jurors, without leaving their seats, upon their oaths do say: "We, the jury in the above-entitled action, find the issues joined in favor of the defendant. W. F. Critchlow, foreman."

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is considered, ordered, and adjudged by the court that said plaintiff take nothing by his complaint herein, and that said defendant go hence without day, and have and recover of and from said plaintiff its costs by it in this behalf incurred, taxed at the sum of $, and let execution issue therefor.

Judgment.

And afterwards, and on the said 29th day of June, 1901, the following judgment was entered in the judgment book of this court, which being entitled in this cause, is in words and figures, to wit:

At this day, this court having been regularly convened according to law, pursuant to adjournment, with officers present as noted on June 26, 1901, the following judgment was by the court ordered entered of record herein, to wit:

Now, on this 29th day of June, 1901, a juridical day of the May term, 1901, of said court, before the Honorable John A. Marshall, judge, W. L. Maginnis appearing as attorney for said plaintiff, and Thomas Marshall and J. C. Royle appearing as attorneys for said defendant, and a jury having been heretofore empaneled and duly sworn, thereupon certain testimony and evidence was introduced on behalf of said plaintiff, and the case of both parties having been rested, the motion of defendant to instruct the jury to return a verdict in its favor was sustained by the court and the jury so instructed. Whereupon said jurors, without leaving their seats, upon their oaths returned the following verdict,
14 to wit: "We, the jury in the above-entitled action, find the issues joined in favor of the defendant. W. F. Critchlow, foreman."

Wherefore, by virtue of the law and by reason of the premises aforesaid, it was considered, ordered, and adjudged by the court that said plaintiff take nothing by its complaint herein, and that said defendant go hence hereof without day, and do have and recover of and from said plaintiff its costs by it in this behalf incurred, taxed at the sum of $, and let execution issue therefor.

Order and stipulation in re. Time to file bill of exceptions.

In the United States circuit court for the district of Utah.

W. O. JOHNSON
vs. } No. 388.
SOUTHERN PACIFIC COMPANY.

At this 16th day of July, 1901, on motion of said plaintiff, by W. L. Maginnis, his attorney, it is ordered that he have time and until thirty days from this day in which to prepare, serve, and file his bill of the exceptions by him reserved on the trial of this action.

JOHN A. MARSHALL, *Judge.*

Filed and entered July 16, 1901. Jerrold R. Letcher, clerk.

And on the 14th day of August, 1901, stipulation in writing was filed by the respective parties hereto, which being entitled in this court and cause, is in words and figures following, to wit:

It is hereby stipulated by and between said parties, by their respective attorneys, that the time allowed plaintiff, by an order of this court, in which to prepare, serve, and file his bill of exceptions herein may be extended twenty days.

August 14th, 1901.

W. L. MAGINNIS, *Attorney for Plaintiff.*
MARSHALL, ROYLE & HEMPSTEAD,
Attorneys for Defendants.

Filed August 14, 1901. Jerrold R. Letcher, clerk.

And afterwards, and on the 31st day of August, 1901, plaintiff lodged with the clerk of this court its bill of exceptions, reserved by him on the trial of this cause, which, on the 16th day of September, 1901, was duly allowed, settled, and made part of the record herein, and
15 which was duly signed and sealed by the judge of this court, which is in words and figures following, to wit:

Bill of exceptions.

In the circuit court of the United States in and for the district of Utah.

W. O. JOHNSON, PLAINTIFF,
vs. } 388.
SOUTHERN PACIFIC COMPANY, DEFENDANT.

Be it remembered that on the trial of this action at the May term, 1901, of said court, before the honorable John A. Marshall, judge, and a jury of twelve good and lawful persons, beginning on Friday, the 28th day of June, 1901, at Salt Lake City, in said district, W. L. Maginnis appearing as attorney for said plaintiff and Thomas Marshall and J. C. Royle appearing as attorneys for said defendant, the following proceedings were had—that is to say:

The plaintiff, to maintain the issues on his part, gave in evidence the following—that is to say:

W. O. JOHNSON, plaintiff, being first duly sworn in his own behalf, testified as follows:

My name is W. O. Johnson; I live in Ogden, and I have lived there about twelve years; during most of that time I have been engaged in the railroad business; having during that time worked for the Union Pacific and Southern Pacific Railroad companies, in the car department on the Union Pacific and as engine wiper, fireman, and brakeman on the Southern Pacific Railroad. I was employed as brakeman on the Southern Pacific Railroad about two years.

On the fifth day of August last I was in Promontory, working in the capacity of brakeman for the Southern Pacific Company, on train No. 207, if I am not mistaken. We came from Terrace that morning; were engaged in the service between Carlin and Ogden. The number of the engine which brought in our train was 1485 and ran between Ogden and Carlin on its regular run.

Train No. 207 is a regular train running between Ogden and San Francisco. The same cars loaded go right through. Engines are usually changed at Carlin and Terrace, but when out of order are changed at other places. This particular engine on this particular day took up the cars at Tarrace to carry them to Ogden, and when we arrived at Promontory I, as head brakeman, was ordered by my conducto r (Conductor Sleeth) to uncouple the engine from our train, go into the cut-off,
16 get the dining car standing there, bring it out on turntable and turn it around, and then couple the train onto the engine again.

The engine was equipped with the Janney or California coupler, a knuckle coupler which opens and closes swinging on a pin similar to a hinge. These couplers open in opposite directions, and when two come together open, they close and make the coupling by impact, and are held in place by a key which is raised by means of a lever on the outside of the car or engine. In the absence of the key the coupler opens and shuts with but little resistance, and when the key is raised the effect is the same. The key is dropped with the same lever, and when down holds the coupling from opening and coming uncoupled.

The Miller hook is made something on the same principle, but will not work with a Janney, for the reason that the hook is on the same side as the Janney and instead of coupling passes over it.

This dining car was standing on a side track at Promontory, a telegraph station, where there are side tracks and switches, etc., but no particular yard and no yard master or switch engines; work done there by engines is done by road engines.

After Conductor Sleeth directed me I cut the engine off of my train, went ahead and threw the switch, let the engine go in on the cut-off to the dining car, which was on the side track in order to put it on the turntable and turn it around as I was ordered by my conductor. I tried to make the coupling with a link and pin, but I failed to make it the first time; I gave the engineer the signal to slack ahead and come back the second time, and I failed again, the link would not enter the Janney; and the third time my arm got caught between the engine bumper and the dining-car vestibule bumper.

I got caught as I was pulling the Miller hook over toward me with my right hand and holding the pin which I was to drop in the Janney coupler with my left hand, and by watching the two points my arm got caught between the bumpers.

I did not notice that there was anything the matter with the Miller hook, except that it was slightly tipped, so that it hung down on one side on account of the strap it rested on being tipped. That had the effect of turning the link with it and made it more difficult to couple.

I have made the same kind of coupling before hundreds of times.

I do not remember that I ever handled that particular car before it was the Del Monte.

My arm was crushed above the wrist. I was taken to the caboose first but afterwards was put on train No. 2 and taken to Ogden hospital,
17 where I remained fourteen days, during which time my arm was amputated once, they took it off high enough the first time so that they would not have to do it again.

There is not much left of my arm now. At that time I was healthy and strong, nothing the matter with me whatever. I was thirty-three

years old and earning between eighty and ninety dollars per month, with a guarantee of eighty dollars per month. We generally averaged about ninety dollars per month.

By reason of the Miller hook being tipped it made it more difficult to make the coupling; it did not rest level and slide level; the nuts were loose on the side away from me, which made the Miller hook turn; that made it hard to make the coupling.

The Miller hook and Janney coupler will not couple automatically by impact.

I had seen this dining car on the road before; I do not know where it ordinarily ran; I would see it almost anywhere wherever a train would pass us with it on; I ran on train between Ogden and Carlin, Nevada. I knew that that car was used regularly on the road between Carlin and Ogden.

Cross-examination by Mr. ROYLE:

I have been in the service of the company about six years; had two years' experience as a brakeman.

Q. Did you know the difficulties in regard to coupling cars?

A. Yes, sir; I knew what the difficulty of the coupler was, because it was a Janney and a Miller, and I most certainly knew it was a "difficulty coupler."

It was dangerous to go between those cars, but I was ordered to do it.

I knew it was a dangerous coupler, but I was taking my time; I was trying three different times.

Q. I see you did. When you first went there did you see the condition it was in?

A. I seen it was a Miller.

Q. And a Janney coupler?

A. Yes, sir.

Q. And did you see this defective part?

A. Well, it was not defective enough to stop me from doing my work; it was defective in that it was kind of tipped, but not otherwise. If it had been coupled with a Miller hook it would not have been difficult; that little tip on it would not hurt, but with a Janney it was difficult.

I saw that it was difficult.

If the Miller hook had been brought in contact with a Miller hook there would have been an automatic coupling; but as far as the Janney was concerned it would not couple automatically.

18 I went in the first time and failed, and saw the difficulties when I did it, but I was supposed to couple it. I was supposed to do that work and was trying it again; I went in the second time.

I had not control over the engine. I gave the engineer the signals, and he obeyed them by going and coming, and a second and third time I went in between those cars, knowing the danger. I was not forced to go in any more than that I knew the consequences if I did not do the work I was told to do. I was always instructed to protect myself, but didn't in this case, because I was ordered to do that coupling.

Q. Well, is that order imperative under any circumstances, that you do the coupling whether dangerous or not dangerous? Do you mean to say

that the conductor meant that when he gave the order that you would run the risk of your life by doing that coupling?

A. I did not run any more risk that time than I had done times and times before.

Q. I understand that you knew the danger, and time and again you had done it. Now, do you understand that this conductor intended you to risk your life when he gave that order to go and do that coupling?

A. He did not intend for me to risk my life, but he intended for me to do that coupling.

Q. Did he intend for you to do that coupling whether practicable or not?

A. It was practicable.

Q. It was not practicable without danger?

A. It was "practical."

Q. Was it practicable without danger?

A. Well, there is danger in all couplers, provided they are not coupled automatically.

Q. You do not answer my question squarely. When you are instructed to take a car is it your duty to take the car and move it, whether it is dangerous or out of order, no matter what is the matter with it; is it your duty to do it under any circumstances, no matter what is the matter with that car?

A. It is not; but the coupler was not broke or anything.

Q. You do not answer my question. Suppose you are ordered to go and move a car—you are ordered to do that—and you go and find it in no condition whatever to move, is it your duty to move that car?

A. That car was not unmovable.

Q. Answer the general question. Is it your duty under such circumstances to move that car?

A. If it ain't moveable I would certainly not move it.

Q. Well, if it is dangerous to life to move it, is it your duty to do it, do you think?

A. This was not dangerous to life.

19 The COURT. You are not asked as to that car. Now assume that it would be dangerous to move some car, would it still be your duty to attempt to make the coupling?

A. No.

Q. It would not be dangerous to life, you say—would it be dangerous to life?

A. No, sir; I did not say it was not.

Q. A man's life would not be sacrificed, then, by going in there under any circumstances to make this coupling?

A. Sir?

Q. Men loose their lives in doing that thing?

A. Men loose their lives right along over the same thing.

Q. That is what I asked you and what I understand you to deny. I asked you if it was dangerous to life for a man to go in there?

A. I did not say this one was dangerous to life.

Q. I am not talking about that. But going in between cars to make this coupling with a pin is dangerous to life or limb?

A. It is.

Q. And you knew that fact?

A. I knew it.

Q. And yet you tried to do this thing three times?

A. Yes.

Q. The only force that was used against you, as I understand you, was that you were instructed by the conductor to perform, to go and turn this car on the turntable?

A. Yes, sir.

Q. No hurry about it and no worry about it?

A. No, sir.

Q. I will ask you if such a book as that was furnished to you when you became fireman, and when you were wiper, engine wiper, and fireman, and brakeman?

A. Yes, sir; it was furnished to me when I got examined for firing, and when I became brakeman. I agreed to those rules and studied them all the time.

Q. Now, here is one rule, "Employees are required to be conversant with and obey the rules and special instructions. If in doubt as to the meaning, they must apply to the proper authority for an explanation." You knew that was there?

A. Oh, yes.

Q. Five persons employed in any service on the trains are subject to the rules?

A. Oh, yes.

Q. Rule 59—the first one is No. 3, the next No. 5, and the next 59. No. 59. Great care must be exercised by all persons in coupling cars, inasmuch as the coupling on cars or engines cannot be uniform in style or strength, and they are liable to be broken from various causes, so as to render it dangerous to those engaged in making couplings; all employes are enjoined before coupling cars or engines to examine and to know the kind and condition of the drawhead, drawbars, links, coupling apparatus, and are forbidden to place in a train any car with a defective coupler until they shall have reported the condition to the conductor or yardmaster." You knew that was there and promised to obey it?

A. Yes, sir; those were the rules handed to me by the defendant company.

Q. Now, when you were ordered to go and make this coupling, did the conductor remain on his train?

A. The conductor was attending to part of his duties; he was unloading way freight.

Q. He was not with you and was not conversant with what you were doing?

A. Not just at that time.

Q. And there was nobody to give you any directions or to tell you what to do; after you got there and found this defective car, there was nobody there—the conductor, at least, was not there?

A. No, sir.

Q. So that you could ask what to do?

A. No, sir.

Q. The conductor did not know anything about it, so far as you knew, about the condition of that car?

A. No.

Redirect examination by Mr. MAGINNIS:

Q. You have been asked about this rule 59, Mr. Johnson. Calling your attention to it, why was it you did not report the condition or fact that this was a Miller hook and a Janney and the fact of that tipping to the conductor?

A. Well, it is a habit that every employee on the railroad service has, that if they find anything that is a little bit wrong and not so serious that they do not run right straight to the conductor, but they try and do their work and go on and not delay the traffic; that is the way that I have always been instructed. I have been so instructed by my superior officers, by a number of them, any one I have been working for. I have never been told to go to work and not report anything, but, as has been the habit with others, I have tried to go over the road the best way I could. If I had not gone in and tried to make the coupling, the car could have been moved by shoving it, but could not have been worked right in that way; it ought to be coupled to go on the turntable, and could not be coupled except by link and pin. It could not be done in any other way. The fact that one of the couplers was a Miller hook and the other a Janney would not be one of the defects that I would report under rule 59. The fact that one was a Miller and the other a Janney is not a defect, at all.

Q. Was there any apparent danger attached to the tipping of the Miller hook?

A. No; not any more than it would have been, but very little if it had been level. Of course, it made it more hard to couple;
21 it made it more hard because it made the link that much harder to enter into the Janney by being slightly tipped.

Q. Would it make it any more difficult to handle?

A. It made me pull on the Miller hook; pull it towards me, because it was eternally sliding by the place [in] was to enter; it had to come up towards me to go into the Janney.

Q. And that is the only difference to what it would have been if it had been in perfect order?

A. Yes; it would have stayed right there.

Cross-examination by Mr. MARSHALL:

Q. Mr. Johnson, you stated that you were instructed not in accordance with what is stated there, not to notice these small matters but to go ahead?

A. Why, I have not been instructed by my conductor to go in there between there; only to go ahead and do that work and couple that car; that is what I have been instructed.

He did not tell me how it was to be done. It was not practicable to move it on the turn table without coupling it. I had control of the engine by way of signals. I signaled the engineer and he obeyed my signals. I told him each time to move back and when to move and each of his movements was in accordance with my signals.

I stood there and tried three times—twice before the accident—to make this coupling.

I examined the coupling before I made the effort, found it slightly tipped, but it did not stop me from making the coupling.

Q. Did you examine to see whether, after seeing that it was slightly tipped to see whether a difficulty coupling to make before you undertook it, or did you go right in there and do it without an examination?

A. I did not run at a breakneck speed in there; not much. I took my time about it, and he was not coming back very swift, either.

He did not come back until I signalled him to come back.

I went in and saw the coupler, and saw just exactly how it ought to be made.

The Miller hook had not sagged; it tipped. I saw that it was tipped. After seeing the condition of things I signalled the engineer to move back his engine.

Q. He moved back and you failed to make the coupling that time?

A. I never made it.

Q. You did not make it?

A. No, sir; not then.

Q. You signalled the engineer to move his engine off a little, didn't you?

A. Yes, sir.

Q. You then took hold of the pin?

A. I did not take hold of the pin.

22 Q. What did you take hold of?

A. I pulled on the link towards me and the Miller hook towards me, and tried to enter the pin into the Janney.

Q. You took hold of the two——?

A. Not two of them.

Q. You took hold of the Miller hook and coupler?

A. Yes; I did not take hold of the Miller hook; I took hold of the link.

Q. Very well; the link. You took hold of the link?

A. Yes.

Q. Did you have hold of the pin also?

A. I had hold of the pin—the one that was loose—with my left hand; yes.

Q. You had the ring in your right hand, did you?

A. I did not have any ring at all; I had a link.

Q. You had the link in your right hand?

A. Yes, sir.

Q. And the pin in your left?

A. Yes, sir.

Q. And then you made a signal for him to come back the second time?

A. And as soon as I gave the signal I grabbed the link with my righ hand.

Q. And you gave the signal?

A. Yes, sir.

Q. And he moved at your order?

A. Yes, sir.

Q. You then failed to do it the second time; you say it was difficult?

A. Yes, sir.

Q. You knew it was dangerous?

A. Yes, sir.

Q. You then signal/ed for him to move his engine off again, so as to enable you to make it; and you then signal/ed him to come back, so you could make the connection?

A. Yes, sir.

Q. And then it was when you were hurt?

A. When I was caught between the bumpers; yes, sir.

Q. The conductor was off some distance attending to other business, was he not?

A. Yes; he was attending to his way billing.

Q. And merely told you to make the coupling?

A. Yes, sir.

Q. And you went up there with no superior in charge of or controlling you?

A. Not just then.

Q. And not just then in the control of the engineer?

A. No, sir.

Q. You yourself was master of the situation, were you?

A. Right then; yes, sir.

Re-direct by Mr. MAGINNIS:

The method I was pursuing at that time was the proper method. I put the link in the Miller hook in the first place, and then attempted to couple on the *the* engine as it backed up.

23 The cause of the tipping of the Miller hook was that the nuts holding the strap where the Miller hook slides was loose on the side away from me, which made the Miller hook tip down on that side, was not damaged enough to go to work and take the Miller hook off, but was enough to make it a difficult coupler.

T. F. ROWLAND, a witness produced by the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. MAGINNIS:

I am a train dispatcher of the Southern Pacific Company, and was last August at Ogden. Had charge of the directing of train movements, which is done, when they are out on the road, by telegraphic orders.

I know the dining car Del Monte. It is used on our road between San Francisco and Ogden. I do not know how long it has been used there; probably over four or five years. I do not know personally what kind of a coupler the car was equipped with.

Q. Mr. Rowland, I wish you would explain to the jury just exactly what the Janney coupler is, please.

A. Well, the Janney coupler—the only way I can explain it is the way it has been explained: Two knuckles that go together, and when they are coupled they are held together by a key which drops down into the knuckle, and when they go to uncouple they have to pull a lever or chain, which raises this key up from the knuckle and it uncouples.

Q. When the key is up will the cars couple by impact?

A. Well, the key stays down all the time.

Q. How do you fix it so that they will couple by impact?

A. Oh, they will couple by impact when it is down; generally the car raises the key and it falls itself.

Q. So that the impact raises the key and it falls itself?
A. Yes, sir.
Q. And then it drops and catches?
A. Yes, sir.
Q. Why is it that a Miller hook won't couple with a Janney?
A. Well, it is a different sort of a coupler and extends on the opposite side from which it should be.

I was not subpœnaed to bring here all the bulletin copies of telegraphic orders in regard to making up trains, and I have no orders in my office in regard to the Del Monte car on the 5th day of August.

I made no search for them, but I know of my own knowledge why the Del Monte car stopped at Promontory.

Q. Why was it?

24 A. Why, the train coming east was so late we could not get the car to Ogden in time to go back on the train that it was due to leave there on, and it was dropped off at Promontory to be picked up by the west-bound train.

The through passenger train to California. It was not absolutely necessary to turn it around. The dining-car conductor requested that it be turned around; "his idea in having it turned was so as to leave the main entrance next to the train."

Q. Turned in preparation of being picked up and put on the passenger train?
A. Yes, sir.
Q. Who was ordered to turn it around; do you know?
A. The conductor of a certain freight train.
Q. Do you remember the number of the train?
A. No; I do not remember the number of the freight train.
Q. Know the conductor's name?
A. Yes; I remember it.
Q. What was his name?
A. Mr. Sleeth.

I do not remember the number of the freight train and do not know whether it was a regular train or not.

Mr. Sleeth ran between Carlin and Ogden.

Q. And then his train run between Ogden and Carlin?
A. Why, yes, sir; he did not run through with the train; he changed crews and engines at Terrace and met No. 4.
Q. But the train itself was a through train running between San Francisco and Utah?
A. Yes, sir.

Cross-examination by Mr. MARSHALL:

Q. I believe you stated just now, on direct examination, that that diner need not be turned at all; was it ordered by you to be turned?
A. Yes, sir.
Q. So turned?
A. Yes, sir.
Q. Could it be moved with safety without turning it?
A. Yes, sir.
Q. Could it be moved without coupling by pushing it on to the turntable?

A That question I could not answer; I do not know just where the car stood in the yard.

Q. You could not state that?

A. No, sir.

Q. Mr. Rowland, the Miller hook is itself an automatic coupler, is it not, when in connection with another Miller?

A. Yes, sir.

Q. And the Janney coupler is an automatic coupler of itself?

A. Yes, sir.

Q. Both, then, are in themselves automatic couplers?

A. Yes, sir.

Q. But they can not be used as automatic couplers together?

25 A. No, sir.

Q. I believe that is what you mean?

A. Yes, sir.

Q. There was the Miller automatic coupler on the dining car?

A. Yes, sir.

Q. And there was a Janney automatic coupler on the tender of the engine or on the engine?

A. Yes, sir.

Q. I understand, Mr. Rowland, that that diner was not in service at the time; it was standing there where it had been left, was it not?

A. Yes, sir.

Q. Waiting to be turned merely and thereafter to be moved on some train going west?

A. Yes, sir.

Q. It was left then by the train that was coming east?

A. Yes, sir.

Q. Originally?

A. Yes, sir.

Q. And was dropped in the yard at Promontory?

A. Yes, sir.

Q. That was the morning train that left it?

A. Yes, sir.

Q. It was to be taken up in the evening train, five o'clock in the afternoon, was it not—a train going west; it was to be picked up at Promontory by that train?

A. Yes, sir; picked up.

Q. And this train on which Johnson was, was a freight train coming east?

A. Yes, sir.

Q. And it was taken advantage of for the purpose of merely turning this diner on the turn table?

A. Yes, sir.

Q. So as to have the kitchen in the rear instead of the front?

A. Yes, sir.

Q. And that was the only object?

A. Of throwing it around; yes, sir.

Q. It was not then on duty, the dining car was not?

A. No.

Q Not in service?
A. No.
Q. It was at the yard at Promontory?
A. Yes, sir.

Redirect examination by Mr. MAGINNIS:

They were getting it ready to go out on the five or six o'clock train No. 5, and turning it around was part of getting it ready for that train.

Q. (By Mr. MARSHALL): It had to be left there and to be turned around and to be picked up by the five o'clock train?

A. Yes, sir.

I could not name the different hooks in use on the Southern Pacific in August, 1900; there were forty or fifty or a hundred different styles of couplers that have been used, and most of them were being used at that time.

26 Q. Would all of there couplers, or what of these couplers you spoke of, 40 or fifty couplers aside from the Miller, couple with the Miller automatically?

A. No, sir.

Q. Would they couple with themselves automatically?

Well, if you changed the coupler it would be a different coupler—if you changed the knuckle with different couplers to make them couple with the Miller or couple with the Janney.

Q. Which was the standard in 1900?

A. That is difficult to answer.

The main difference between the Miller hook and the Janney coupler is the direction in which the hook points.

A number of other kinds of couplers were used on the Southern Pacific. I can not say which was the standard as to the direction which they pointed, the Miller or the Janney; we were using both at that time. Not being familiar with the Master Mechanic or Car Builders' rules at that time I could not answer; I do not know which was the standard coupler at that time.

I can not say which was in the majority as to the way in which they pointed.

Examination by the COURT:

Q. Do you know whether at that time or prior to that time, two years prior to that time, the railroad had been accustomed to use a coupler with a link in the yards, switching and under various circumstances?

A. Yes; they had. There was the Janney and the Miller, and there was several couplers used in that way.

Q. Coupled with links?

A. Yes, sir; but in all cases it was understood——

Q. Never mind what was understood. I mean the fact whether it had been used, the link; had it been used frequently or not for the two years prior to the 5th day of August, 1900?

A. Yes, sir.

Adjourned to Saturday, June 29, 1901.

S. C. SLAUGHTER, a witness produced by plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. MAGINNIS:

I live at Ogden, am a switchman by occupation on the Southern Pacific. Have been engaged with that company about three years, in Ogden yard and Terrace as well. I was engaged prior to the 6th day of August last in the Ogden yard, handling cars in the employ of the Southern Pacific Company.

27 We used to handle the dining car Del Monte quite often in the yard there.

I can't give you no certain date; we did not have the car every day; this car that went west and came back. I could not say when I [say] the car prior to the 5th of August.

I saw in the papers that Johnson lost a hand and I heard of it about the time of the accident. I had seen the car shortly before that time. Cannot fix the date.

To explain the matter there was several of us switchmen who took turn about doing this passenger work, every two weeks about. I don't know whether it had been over three days or the first day on the three weeks or not or whether it was the last end of it; we were switching two weeks apart about.

They did not double the dining cars back into Ogden at that time; I would not be positive but I think they were in Ogden every three days. I mean at the time of the accident. Now the car comes in on No. 6 in the morning and goes back on No. 5, at 11.15, and be there at 5.45, and goes back at 10.45.

In handling the passenger trains we had two weeks on and two off, and that car would come in every three days unless something happened to it, like shopping it, and holding it down below and substituting another car.

I cannot say when I saw it before the time of the accident. It might have been cut out and not been on the line may be two weeks and may be a month; they would often run diners up that did not belong on this end at all.

The coupling apparatus on this car was permanent, not something that was changed frequently, but you can remove this knuckle in case you break a knuckle out of it.

I could not state whether or not we handled that car in July, last year; I may have handled and may not have handled it; we handle the Southern Pacific cars, and often handle dining cars but never pay much attention to it.

No, my attention had never been called to it by any person, we made several remarks about it when coupling on it among the switchmen ourselves. I had noticed its condition. It was not the principal one, the other ones, too, as well as that one.

(This question is misplaced; belongs on page 15 at place marked "X.")

Q. Mr. Slaughter, I will ask you, prior to this, state what kind of a coupler was that car equipped with, and up to the time of the accident.

(Objected to because the foundation was not laid and this witness has particularly stated that he knew nothing about it immediately prior to the accident.

Objection sustained. To which ruling the plaintiff then and there excepted.)

28 We could handle the other dining cars a little easier than we could on that one.

I could not say when it was; I might be wrong about it. Very frequently speak about them; every time you get a car you can't couple easy we have a little consultation among ourselves.

I was working in the Ogden yards at the time of the accident.

I went to work in the Ogden yards when I came from Terrace; possibly two or three months before the accident.

And during that two or three months, every other two weeks I handled the dining cars in the passenger trains.

Q. And during these two or three weeks it was customary for these dining cars to be in once in three days?

A. Yes. I cannot say when I first noticed it.

Q. Or about when?

A. I could not say on that until they called attention to it, had a coupling on it, I would not pay any attention to it; think about something else; very frequently have a car with a coupler on it, and pass them up—I say very frequently have cars with a coupler on it that is not altogether proper' equipped, but we never pay any attention to that; we do our work.

Q. Can you state, Mr. Slaughter, about how often you noticed it, if you noticed it more than once?

A. If I had known how many trips the dining car had made between Ogden and Sacramento—but then the car might have been cut out, may have been held out a trip or two.

Very frequently hold out a car, put it in the shop at Sacramento and substitute another car.

Cars equipped just the same as the Del Monte.

I cannot state how often I noticed this particular car. I have coupled on the car myself.

I have noticed it, yes. I could not say how many times I noticed it; I know I have coupled on to the car.

I could not state (how many times coupled it); I would not state because I can't positively say how many times I did notice it.

Not four or five times.

I have coupled it a number of times.

I have coupled this particular car "may be half a dozen times."

The carrying iron, the iron used to hold up the draw bar was a little low on one side when we came to couple on to it. I think it was (low) on the left the way we were working with the car, it would be tilted in this way.

I noticed it (in this condition) about six times, I believe.

I did not notice any change in it; the draw head disappeared from the car is all I know; that had been removed.

The last time I handled that car (before the accident to Johnson) it was in the same condition.

29 Q. About how long before the accident was that?

A. I could not say; it might have been in the freight yards; I was not switching the passenger cars then at the time the accident occurred.

Q. What would be the limit, a week, two or three weeks?

A. Two weeks, yes; they would change every two weeks.

Q. So that probably the last time, it was along about two weeks, as I understand you?

A. Yes, sir.

Cross-examination by Mr. MARSHALL:

I am now in the companies' employ, a switchman at Ogden, where I was at the time of the accident.

Every two weeks we were changed from the freight yards to passenger. I could not say whether I was engaged in the passenger yards in August or not. I was engaged in the yard when Mr. Johnson was hurt, but would not say I was engaged at the passenger depot.

Q. I ask you if you were engaged there where the diners are?

A. All connected with them; we have separate places, but all connected in one yard, but separate parts.

I could not say whether I was in the freight or passenger work.

I know whether I was in the yards at all or not. I was in the yards.

I could not state whether I was in the passenger yards at the time Mr. Johnson got hurt or not.

I think I can identify other cars that were in the yards that I handled immediately prior to the fifth of August.

I was not handling any diners at the time Johnson got hurt.

Q. I say within two weeks; name some other diner that you were handling.

A. I suppose I can.

Q. Well, name the other diners that you handled.

A. I think the Southerland was in the service.

Q. Do you remember the condition of the coupler on the Southerland at that time?

A. No, sir; I do not.

Q. Do you remember the name of some other diner that you handled?

A. I think the Muscatel.

Q. Did you notice the couplers of that within two or three weeks prior to August fifth, 1900?

A. No; I think not; I never had any trouble to couple on that one.

I think the Zinfandel, another one in the service then.

We did not have any trouble coupling on to the other diners.

My attention was particularly called to the Del Monte because it was a different drawhead altogether.

I did not notice as to the irons that held up any of these other
30 drawheads; no necessity; automatic coupler, and you just have to couple on, and this other diner you have to use a link and pin and hook.

I did not notice those as to what condition they were in; only noticed the Del Monte.

What called my attention to it, it was a little hard to couple on to.

The iron that supported the rod was lower on one side.

(In the Miller hook) There is a small pin there to enter the link in case you have no corresponding one with it; you use a link and pin, and if you enter it on a curve or a straight track it is difficult to couple on;

may get the pin in the knuckle and may not, and may have to lift the drawhead up to enter the line.

I can't tell when I noticed this on the Del Monte; I think about two weeks; maybe three weeks.

I am positive I noticed that condition of things about two weeks prior to the accident.

I will not say that the Del Monte was in that yard exactly two weeks.

I said we would change every two weeks; I might have handled it, and that the car might have been cut out and not on the run.

I can't make any positive dates when I did handle it.

I can not say whether two weeks or three weeks that diner was in the yard at Ogden; I don't know but that it was held over at Sacramento.

I could not say; I never paid any attention to it. It might have been in the yard or maybe not.

I say that is my judgment; I think it is about every two weeks I saw the car.

It might have been two weeks and it might have been three (when I last saw that car and noticed its coupling) I don't say whether in there in two weeks, right on the spot.

I can't tell; the car might have been cut out, but I say we were changed on this work every two weeks.

This coupler would couple with a Miller hook, and this tipping would not have affected that at all. If the engine had been equipped with a Miller hook it would not have been affected at all.

W. O. JOHNSON, plaintiff, being recalled as a witness in his own behalf, testified as follows:

Direct examination by Mr. MAGINNIS:

Q. Mr. Johnson, why did you not report it (the lowering or tipping of the Miller hook)?

A. Why, in the first place there was—when I got my orders
31 from my conductor to go in on the car we did not have but very little time ahead of No. 2, and in the other place there was no repair shop at Promontory, and it was not hardly enough to make any particular notice of it. That was why I did not report it.

(No cross-examination.)

And thereupon said plaintiff rested his case. And the above and foregoing was all the evidence introduced herein.

Whereupon said defendant moved the court to peremptorily instruct the jury to return a verdict in its favor for the reason that plaintiff has failed to make out a case upon his own evidence and because the evidence shows that the defendant is entitled to such an instruction for a verdict in its favor.

And the court having heard the arguments of counsel and being well advised in the premises, doth sustain said motion.

And thereupon the court instructed the jury as follows:

Gentlemen of the jury, the court will relieve you of any further consideration of this case and of all responsibility as to a verdict, and instruct you to find a verdict for the defendant. One of your number may sign the verdict without leaving the box.

To the giving of which instruction plaintiff then and there excepted for the reason that the evidence introduced is sufficient to justify the submission of the case to the jury.

Whereupon said jury without leaving their seats, returned a verdict finding the issues joined in favor of the defendant, upon which judgment was duly entered that defendant go hence without day and recover its costs.

And for as much as the matters and things above set forth do not appear fully of record in this action, said plaintiff tenders this his bill of exceptions by him reserved on the trial of this action, and prays that the same may be settled, allowed and signed by the judge of this court and made a part of the record of this case, which is now done accordingly on this 16th day of September, 1901. Signed and sealed in open court.

JOHN A. MARSHALL,
Judge of circuit court of the United States for the district of Utah.

388. Service of a copy of this proposed bill of exceptions is hereby acknowledged on this 31 day of August, 1901. Marshall Royal & Hempstead, attorneys for defendant. Deposited in clerk's office, August 31, 1901. Jerrold R. Letcher, clerk.

32 *Petition for writ of error.*

And afterwards and on the 16th day of December, 1901, plaintiff filed his petition for writ of error, which being entitled in this court and cause, is in words and figures following, to wit:

And now comes W. O. Johnson, plaintiff herein, and says that on or about the 28th day of June, 1901, this court entered judgment herein in favor of the defendant, and against this plaintiff, in which judgment and proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors filed with this petition.

Wherefore this plaintiff prays that a writ of error may issue in this behalf to the United States circuit court of appeals for the eighth judicial circuit, for the correction of errors so complained of and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to said circuit court of appeals.

W. L. MAGINNIS,
Attorney for Plaintiff.

Filed December 16, 1901. Jerrold R. Letcher, clerk.

Assignment of errors.

And afterwards and on the same day, plaintiff filed his assignment of errors, which, being entitled in this court and cause, is in words and figures following, to wit:

The plaintiff in this action, in connection with his petition for a writ of error, makes the following assignment of errors which he avers occurred upon the trial of the cause, to wit:

(1) The court erred in instructing the jury to find a verdict for the defendant.

(2) The court erred in overruling the motion of plaintiff for a new trial.
(3) The court erred in entering judgment in favor of the defendant and against the plaintiff.

W. L. MAGINNIS,
Attorney for Plaintiff.

Filed December 16, 1901. Jerrold R. Letcher, clerk.

Order allowing writ of error.

And afterwards and on the same day, an order was made by the judge of this court, which, being entitled in this court and cause, is in words and figures following, to wit:

33 This 16th day of December, A. D. 1901, came the plaintiff by his attorney, and filed herein and presented to the court his petition praying for the allowance of a writ of error intended to be urged by him, and praying also that a transcript of the record and proceedings and papers upon which judgment herein was rendered, [duth] authenticated, may be sent to the United States circuit court of appeals for the eighth judicial circuit, and that such other and further proceeding may be had as may be proper in the premises.

On consideration whereof the court does allow the writ of error upon the plaintiff giving bond according to law in the sum of $300 dollars, which shall operate as a supersedeas bond.

J. A. MARSHALL,
District judge.

Filed December 16, 1901. Jerrold R. Fletcher, clerk.

Bond on appeal.

And afterwards and on the same day, plaintiff filed his bond on appeal on writ of error, which being entitled in this court and cause, is in words and figures following, to wit:

Know all men by these presents, that we, W. O. Johnson, as principal, and Peter Nordquist and P. A. Nordquist, as sureties, are held and firmly bound unto the defendant, Southern Pacific Company, in the full and just sum of three hundred dollars to be paid to the said defendant, Southern Pacific Company, its certain attorneys, executors, administrators, or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 10th day of December, in the year of our Lord one thousand nine hundred and one.

Whereas, lately at a circuit court of the United States for the district of Utah, in a suit pending in said court between W. O. Johnson, plaintiff, and Southern Pacific Company, defendant, a judgment was rendered against the said W. O. Johnson, and the said W. O. Johnson having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Southern Pacific Company citing and admonishing it to be and appear at a session of the United States circuit court of

appeals for the eighth judicial circuit, to be holden at the city of St. Paul, in said circuit, on the —— day of May, 1902.

34 Now the condition of the above obligation is such that if the said W. O. Johnson shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

Signed, sealed, and delivered in the presence of—
THO. MALONEY.

W. O. JOHNSON, [SEAL.]
PETER NORDQUIST, [SEAL.]
P. A. NORDQUIST. [SEAL.]

Approved by
JOHN A. MARSHALL,
District Judge.

STATE OF UTAH,
County of Weber, ss:

Peter Nordquist and P. A. Nordquist, being each first severally duly sworn, according to law, on oath depose and say: That he is a resident and freeholder of the above-named county and State, and is worth the sum specified in the foregoing undertaking over and above all his just debts and liabilities, exclusive of property exempt from execution.

PETER NORDQUIST.
P. A. NORDQUIST.

Subscribed and sworn to before me this 10th day of December, 1901.
[SEAL.] THO. MALONEY,
Notary Public.

My commission expires April 22nd, 1902.

Bond filed December 16, 1901. Jerrold R. Letcher, clerk.

In the United States circuit court for the district of Utah.

Certificate.

I, Jerrold R. Letcher, clerk of the United States circuit court for the district of Utah, do hereby certify that the foregoing pages numbered from one to 50, inclusive, contain a full, true, and complete transcript of all the pleadings, proceedings, and record entries (except praecipe and order setting cause for trial June 28, 1901, 2 subpoenas, notice motion new trial, plaintiff's affidavit as to service bill exceptions, order allowing plaintiff file petition new trial, petition new trial nunc pro tunc August 5, order amending order of September 2, order entered re plaintiff's motion new trial argued and submitted, and order denying

35 same) in a certain cause adjudicated in said court wherein W. O. Johnson was plaintiff and Southern Pacific Company, a corporation, was defendant, as full, true, and complete as the originals of the same now remain on file and of record in my office.

I further certify that the original writ of error and the original citation are hereto attached and herewith returned with the transcript of the record in said cause.

In testimony whereof, I affix my official signature and the seal of said court, at Salt Lake City, in said district on this 10th day of February, A. D. 1902, and of the Independence of the United States of America, the 126th year.

[United States circuit court, district of Utah.] JERROLD R. LETCHER, *Clerk.*

Filed Feb. 20, 1902. John D. Jordan, clerk.

Writ of error.

UNITED STATES OF AMERICA, ss:

The President of the United States of America, to the honorable judges of the United States circuit court for the district of Utah, greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court for the district of Utah, before you, at the May term, 1901, thereof, between W. O. Johnson, plaintiff, and Southern Pacific Company, defendant, a manifest error hath happened to the great damage of the said W. O. Johnson, plaintiff, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals, for the eighth circuit, together with this writ, so that you have the said record and proceedings aforesaid at the city of St. Louis, Missouri, and filed in the office of the clerk of the United States circuit court of appeals, for the eighth circuit, on or before the 15th day of February, A. D. 1902, to the end that the record and proceedings aforesaid being inspected, the United States circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

36 Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 16th day of December, in the year of our Lord one thousand nine hundred and one.

Issued at office in Salt Lake City, Utah, with the seal of the United States circuit court for the district of Utah, and dated as aforesaid.

[United States circuit court, district of Utah.] JERROLD R. LETCHER,
Clerk of the United States Circuit Court for the District of Utah.

Allowed by

United States District Judge.

UNITED STATES OF AMERICA,
District of Utah, ss:

In obedience to the command of the within writ, I herewith transmit to the United States circuit court of appeals a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereto subscribe my name and affix the seal of the United States circuit court for the district of Utah.

[United States circuit court, district of Utah.] JERROLD R. LETCHER.
Clerk of United States Circuit Court.

Filed Feb. 20, 1902. John D. Jordan, clerk.

Citation.

United States of America, to Southern Pacific Company, greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the United States circuit court for the district of Utah, wherein W. O. Johnson is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

37 Witness, the honorable John A. Marshall, judge of the United States district court for the district of Utah, and presiding in the United States circuit court for said district of Utah, on this 16th day of December, 1901.

J. A. MARSHALL, *Judge.*

Service of above admitted this 18th day of December, 1901.

THOMAS MARSHALL,
Atty. for S. P. R. R. Co.

Lodged in clerk's office Dec. 18, 1901.

JERROLD R. LETCHER, *Clerk.*

Filed Feb. 20, 1902. John D. Jordan, clerk.

38 (Appearance for plaintiff in error.)

And on the twenty-second day of February, A. D. 1902, an appearance of counsel for plaintiff in error was filed in the clerk's office of said circuit court of appeals in said cause in words and figures following, to wit:

United States circuit court of appeals, eighth circuit.

W. O. JOHNSON, PLAINTIFF IN ERROR,
vs.
THE SOUTHERN PACIFIC COMPANY. } No. 1722.

The clerk will enter my appearance as counsel for the plaintiff in error.

W. L. MAGINNIS.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1722. W. O. Johnson, plaintiff in error, vs. The Southern Pacific Company. Appearance. Filed Feb. 22, 1902. John D. Jordan, clerk. W. L. Maginnis, counsel for plff. in error.

(Appearance for defendant in error.)

And on the twentieth day of February, A. D. 1902, an appearance of Mr. Martin L. Clardy as counsel for the defendant in error was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following, to wit:

United States circuit court of appeals, eighth circuit.

W. O. JOHNSON, PLTFF. IN ERROR,
vs.
SOUTHERN PACIFIC COMPANY, DEFT. IN ERROR. } No. 1722.

The clerk will enter my appearance as counsel for the deft. in error.

MARTIN L. CLARDY.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1722. W. O. Johnson, P. E., vs. Southern Pacific Co., D. E. Appearance. Filed Feb. 20, 1901, John D. Jordan, clerk. Martin L. Clardy, counsel for deft. in error.

39

(Appearance for defendant in error.)

And on the thirty-first day of May, A. D. 1902, there was filed in the clerk's office of said circuit court of appeals, in said cause, an appearance of Mr. Henry G. Herbel for defendant in error, in words and figures following, to wit:

United States circuit court of appeals, eighth circuit, May term, 1902.

W. O. JOHNSON
vs.
SOUTHERN PACIFIC COMPANY, DEFT. IN ERROR. } No. 1722.

The clerk will enter my appearance as counsel for the deft. in error.

HENRY G. HERBEL.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. May term, 1902. No. 1722. Johnson vs. So. Pac. Co. Appearance. Filed May 31, 1902. John D. Jordan, clerk. Henry G. Herbel, counsel for deft. in error.

Order of submission.

And on the third day of June, A. D. 1902, in the record of the proceedings of said circuit court of appeals is an order of submission in said cause, in the words and figures following, to wit:

United States circuit court of appeals, eighth circuit, May term, 1902.

TUESDAY, *June 3, 1902.*

W. O. JOHNSON, PLAINTIFF IN ERROR,
vs.
THE SOUTHERN PACIFIC COMPANY. } No. 1722.

In error to the circuit court of the United States for the district of Utah.

40 This cause having been called for hearing in its regular order, argument was commenced by Mr. W. L. Maginnis for plaintiff

in error, continued by Mr. Henry G. Herbel for defendant in error, and concluded by Mr. W. L. Maginnis for plaintiff in error. Thereupon this cause was submitted to the court on the transcript of record from said circuit court and the briefs of counsel filed herein.

OPINION.

And on the twenty-eighth day of August, A. D. 1902, an opinion of said United States circuit court of appeals was filed in said cause, in words and figures following, to wit:

41 United States circuit court of appeals, eighth circuit.

No. 1722. May term, A. D. 1902.

W. O. JOHNSON, PLAINTIFF IN ERROR, vs. SOUTHERN PACIFIC COMPANY, DEFENDANT in error.	In error to the circuit court of the United States for the district of Utah.

Mr. W. L. Maginnis for plaintiff in error.

Mr. Henry G. Herbel (Mr. Martin L. Clardy was with him on the brief) for defendant in error.

Before Sanborn and Thayer, circuit judges, and Lochren, district judge.

Syllabus.

1. Automatic couplers—Act of March 2, 1893, does not require locomotives to be equipped with.

The act of March 2, 1893 (27 Stat., c. 196, p. 531), does not make it unlawful for common carriers to use locomotives engaged in interstate commerce which are not equipped with automatic couplers.

2. Construction of statutes—Act changing common law strictly construed.

A statute changing the common law modifies or abrogates it no farther than the clear import of its language necessarily requires.

3. Construction of statutes—Penal statute strictly construed.

A penal statute may not be so broadened by construction as to make it cover and authorize the punishment of otherwise lawful acts which are not denounced by the usual meaning of its express terms.

42 4. Construction of statutes—Enumeration of subjects excludes others.

A statute which enumerates the parties, things, or acts which it denounces thereby impliedly excludes all others from its effect.

5. Construction of statutes—When not permissible.

When the language of a statute is unambiguous and its meaning is plain, it must be held to mean and the legislative body must be held to have intended what it plainly expresses, and no room is left for construction.

6. Negligence—Assumption of risk.

A servant assumes the ordinary risks and dangers of the employment upon which he enters, so far as they are known to him, and so far as

they would have been known to one of his experience, age, and capacity by the use of ordinary care.

7. Negligence—Assumption of risk of coupling cars with different couplers.

A brakeman of ordinary intelligence and experience assumes the risks and dangers of coupling cars provided with different kinds of well-known couplers, bumpers, and deadwoods, because these are the ordinary risks and dangers of his service.

8. Automatic couplers—Act of March 2, 1893—Equipment of car with one kind of coupler sufficient.

The equipment under the act of March 2, 1893, of a car with automatic couplers which will couple automatically with those of the same kind or make is a compliance with the statute. It does not require cars used in interstate commerce to be equipped with couplers which will couple automatically with cars equipped with automatic couplers of other makes.

9. Act of March 2, 1893—When car is used in moving interstate traffic.

Cars loaded with articles shipped to other States and started, whether in yards, on side tracks, or in trains, are used in moving interstate traffic. But vacant cars in yards, on side tracks, in repair shops, or in trains which are not loaded with, or in use to move, articles of interstate commerce do not fall within the terms or meaning of the act of March 2, 1893.

A dining car standing empty on a side track at an intermediate station where it had been left by a train engaged in interstate traffic until it should be taken by another train engaged in the same traffic going in the opposite direction, and which the owner intended to use in interstate traffic, was drawn by a freight engine from the side track to the turntable, turned, and placed again upon the side track.

Held, That the car was not used in moving interstate traffic while it was on the side track and while it was being turned.

43 STATEMENT.

This is an action for damages for a personal injury in which the court instructed the jury to return a verdict for the defendant upon this state of facts: The defendant was operating passenger trains between San Francisco, in the State of California, and Ogden, in the State of Utah. It was in the habit of drawing a dining car in these trains. Such a car formed a part of a train leaving San Francisco and ran through to Ogden, where it was ordinarily turned and put into a train going west to San Francisco. On August 5, 1900, the east-bound train was so late that it was not practicable to get the dining car into Ogden in time to place it in the next west-bound train, and it was therefore left on a side track at Promontory, in the State of Utah, to be picked up by the west-bound train when it arrived. While it was standing on this track the conductor of a freight train, which arrived there, was directed to take this dining car to a turntable, turn it, and place it back upon the side track, so that it would be ready to return to San Francisco. The conductor instructed his crew to carry out this direction. The plaintiff, Johnson, was the

head brakeman, and he undertook to couple the engine to the dining car for the purpose of carrying out the order of the conductor. The freight engine was equipped with a Janney coupler, which would couple automatically with another Janney coupler and the dining car was provided with a Miller hook or Miller coupler, which would couple automatically with another Miller hook, but the Miller hook would not couple automatically with the Janney coupler, because it was on the same side and would pass over it. Johnson knew this and undertook to make the coupling by means of a link and pin. He knew that it was a difficult coupling to make and that it was necessary to go between the engine and the car to accomplish it, and that it was dangerous to do so. Nevertheless he went in between the engine and the car and tried to make the coupling three times without objection or protest. He failed twice, and the third time his hand was caught and crushed so that it became necessary to amputate his arm above the wrist.

Sanborn, circuit judge, after stating the case as above, delivered the opinion of the court.

Under the common law the plaintiff assumed the risks and dangers of the coupling which he endeavored to make, and for that reason he is estopped from recovering the damages which resulted from his undertaking. He was an intelligent and experienced brakeman, familiar with the couplers he sought to join and with their condition, and well aware of the difficulty and danger of his undertaking, so that he falls far within the familiar rules that the servant assumes the ordinary risks and dangers of the employment upon which he enters so far as they are known to him, and so far as they would have been known to one of his age, experience, and capacity by the use of ordinary care, and that the risks and dangers of coupling cars provided with different kinds of well-known couplers, bumpers, brakeheads, and deadwoods are the ordinary
44 risks and dangers of a brakeman's service. Bohn Mfg. Co. v. Erickson, 55 Fed. 943, 946, 5 C. C. A. 341, 343; Northern Pac. R. Co. v. Blake, 27 U. S. App. 190, 194, 11 C. C. A. 93, 95, 63 Fed. 45, 47; King v. Morgan, 48 C. C. A. 507, 511, 109 Fed. 446, 450; Moon-Anchor Consol. Gold Mines v. Hopkins, 111 Fed. 298, 304, 49 C. C. A. 347, 353; Railroad Co. v. McDade, 135 U. S. 554, 570; Southern Pac. Co. v. Seley, 152 U. S. 145, 152; Kohn v. McNulta, 147 U. S. 238, 241; Railroad Co. v. Voight, 176 U. S. 498; Sweeney v. Envelope Co., 101 N. Y. 520; Michigan Central Ry. Co. v. Smithson, 15 Mich. 212; Hodges v. Kimball, 44 C. C. A. 193, 104 Fed. 745; Whitcomb v. Standard Oil Co., (Ind) 55 N. E. 440, 442; Boland v. Louisville & N. R. Co., 18 Southern 99.

This proposition is not seriously challenged, but counsel base their claim for a reversal of the judgment below upon the position that the plaintiff was relieved of this assumption of risk and of its consequences by the provisions of the act of Congress of March 2, 1893 (27 Stat., c. 196, p. 531). The title of that act and the parts of it that are material to the consideration of this contention are these:

"An act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes."

"Sec. 1. That from and after the first day of January, 1898, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system." * * *

"Sec. 2. That on and after the first day of January, 1898, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

"Sec. 6. That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act shall be liable to a penalty of one hundred dollars for each and every such violation." * * *

"Sec. 8. That any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provisions of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge."

The first thought that suggests itself to the mind upon a perusal of this law and a comparison of it with the facts of this case is that this statute has no application here because both the dining car and the engine were equipped as this act directs. The car was equipped with Miller couplers which would couple automatically with couplers of the same construction upon cars in the train in which it was used to carry on interstate commerce, and the engine was equipped with a power driving
45 wheel brake such as this statute prescribes. To overcome this difficulty, counsel for the plaintiff persuasively argues that this is a remedial statute; that laws for the prevention of fraud, the suppression of a public wrong, and the bestowal of a public good are remedial in their nature and should be liberally construed to prevent the mischief and to advance the remedy, notwithstanding the fact that they may impose a penalty for their violation, and that this statute should be so construed as to forbid the use of a locomotive, as well as a car, which is not equipped with an automatic coupler. In support of this contention he cites Sutherland on Statutory Construction, § 360, Wall v. Platt, 169 Mass., 398; Taylor v. United States, 3 How., 197, and other cases of like character. The general propositions which counsel quote may be found in the opinions in these cases, and in some of them they were applied to the particular facts which those actions presented. But the interpolation in this act of Congress by construction of an ex post facto provision that it is, and ever since January 1, 1898, has been, unlawful for any common carrier to use any engine in interstate traffic that is or was not equipped with couplers coupling automatically, and that any carrier that has used or shall use an engine not so equipped has been and shall be liable to a penalty of $100 for every violation of this provision is too abhorrent to the sense of justice and fairness, too rank and radical a piece of judicial legislation, and in violation of too many established

and salutary rules of construction to commend itself to the judicial reason or conscience.

The primary rule for the interpretation of a statute or a contract is to ascertain, if possible, and enforce the intention which the legislative body that enacted the law, or the parties who made the agreement, have expressed therein. But it is the intention expressed in the law or contract, and that only, that the courts may give effect. They can not lawfully assume or presume secret purposes that are not indicated or expressed by the statute itself and then enact provisions to accomplish these supposed intentions. While ambiguous terms and doubtful expressions may be interpreted to carry out the intention of a legislative body which a statute fairly evidences, a secret intention cannot be interpreted into a statute which is plain and unambiguous and which does not express it. The legal presumption is that the legislative body expressed its intention, that it intended what it expressed, and that it intended nothing more. United States v. Wiltberger, 5 Wheaton, 76; Union Central Life Ins. Co. v. Champlin, 116 Fed., 858; Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co., 114 Fed., 77, 81; Railway Co. v. Bagley, 60 Kan., 424, 431; Woolsey v. Ryan, 59 Kan., 601; Davie v. Mining Co., 93 Mich., 491; Vogel v. Pekoe, 157 Ill., 339; Campbell v. Lambert, 36 La. Ann., 35; Turnpike Co. v. Coy, 13 Oh. St., 84; Stensgaard v. Smith, 43 Minn., 11.

Construction and interpretation have no place or office where the terms of a statute are clear and certain and its meaning is plain. In such a case they serve only to create doubt and to confuse the judgment. When the language of a statute is unambiguous and its meaning evident, it must be held to mean what it plainly expresses and no room is left for
46 construction. Swarts, trustee, v. Siegel, Fed. ; Knox County v. Morton, 15 C. C. A., 671, 673, 68 Fed., 787, 789; St. Paul, M. & M. Ry. Co. v. Sage, 17 C. C. A., 558, 565, 71 Fed., 40, 47; U. S. v. Fisher, 2 Cranch, 358, 399; Railway Co. v. Phelps, 137 U. S., 528, 536.

This statute clearly prohibits the use of any engine in moving interstate commerce not equipped with a power driving-wheel brake, and the use of any car not equipped with automatic couplers, under a penalty of one hundred dollars for each offense, and it just as plainly omits to forbid under that or any penalty the use of any car which is not equipped with a power driving-wheel brake and the use of any engine that is not equipped with automatic couplers. This striking omission to express any intention to prohibit the use of engines unequipped with automatic couplers raises the legal presumption that no such intention existed, and prohibits the courts from importing such a purpose into the act and enacting provisions to give it effect.

The familiar rule that the expression of one thing is the exclusion of others points to the same conclusion. Section 2 of the act does not declare that it shall be unlawful to use any engine or car not equipped with automatic couplers, but that it shall be unlawful only to use any car lacking this equipment. This clear and concise definition of the unlawful act is a cogent and persuasive argument against the contention that the use without couplers of locomotives, hand cars, or other means of conducting inter-state traffic was made a misdemeanor by this act.

Where the statute enumerates the persons, things, or acts affected by it, there is an implied exclusion of all others. (Sutherland on Statutory Construction, § 227.) And when the title of this statute and its first section are again read, when it is perceived that it was not from inattention, thoughtlessness, or forgetfulness, that it was not because locomotives were overlooked or out of mind, but that it was advisedly and after careful consideration of the equipment which they should have that Congress forbade the use of cars alone without automatic couplers—when it is seen that the title of the act is to compel common carriers to "equip their cars with automatic couplers * * * and their locomotives with driving-wheel brakes," that the first section makes it unlawful to use locomotives not equipped with such brakes and the second section declares it to be illegal to use cars without automatic couplers, the argument becomes unanswerable and conclusive.

Again, this act of Congress changes the common law. Before its enactment servants coupling cars used in interstate commerce without automatic couplers assumed the risk and danger of that employment, and carriers were not liable for injuries which their employés suffered in the discharge of this duty. Since its passage the employés no longer assume this risk, and if they are free from contributory negligence they may recover for the damages they sustain in this work. A statute which thus changes the common law must be strictly construed. The common or the general law is not further abrogated by such a statute than the clear import of its language necessarily requires. Shaw v. Railroad Co., 101 U. S., 557, 565; Fitzgerald v. Quann, 109 N. Y., 441, 445; Brown v. Barry, 3 Dallas, 365, 367. The language of this statute does not require the abrogation of the common law that the servant assumes the risk of coupling a locomotive without automatic couplers with a car which is provided with them.

47 Moreover, this is a penal statute, and it may not be so broadened by judicial construction as to make it cover and permit the punishment of an act which is not denounced by the fair import of its terms. The acts which this statute declares to be unlawful and for the commission of which it imposes a penalty were lawful before its enactment and their performance subjected to no penalty or liability. It makes that unlawful which was lawful before its passage and it imposes a penalty for its performance. Nor is this penalty a mere forfeiture for the benefit of the party aggrieved or injured. It is a penalty prescribed by the statute and recoverable by the Government. It is, therefore, under every definition of the term a penal statute. The act which lies at the foundation of this suit, the use of a locomotive which was not equipped with a Miller hook to turn a car which was duly equipped with automatic couplers, was therefore unlawful or lawful as it was or was not forbidden by this statute. That act has been done. When it was done, it was neither forbidden nor declared to be unlawful by the express terms of this law. There is no language in it which makes it unlawful to use in interstate commerce a locomotive engine which is not equipped with automatic couplers. The argument of counsel for the plaintiff is, however, that the statute should be construed to make this act unlawful because it falls within the mischief which Congress was seeking to remedy, and hence it should be presumed that the legislative body intended to

denounce this act as much as that which it forbade by the terms of the law. An ex post facto statute which would make such an innocent act a crime would be violative of the basic principles of Anglo-Saxon jurisprudence. An ex post facto construction which has the same effect is equally abhorrent to the sense of justice and of reason. The mischief at which a statute was leveled and the fact that other acts which it does not denounce are within the mischief and of equal atrocity with those which it forbids do not raise the presumption that the legislative body which enacted it had the intention, which the law does not express, to prohibit the performance of the acts which it does not forbid. Nor will they warrant a construction which imports into the statute such a prohibition. The intention of the legislature and the meaning of a penal statute must be found in the language actually used, interpreted according to its fair and usual meaning and not in the evils which it was intended to remedy nor in the assumed secret intention of the lawmakers to accomplish that which they did not express. United States v. Wiltberger, 5 Wheaton, 76; Sarlls v. United States, 152 U. S., 570; United States v. Harris, 177 U. S., 305, 309; Sutherland on Statutory Construction, § 208. The decision and opinion of the Supreme Court in United States v. Harris, 177 U. S., 305, 309, is persuasive, nay, it is decisive, in the case before us. The question there presented was analogous to that here in issue. It was whether Congress intended to include receivers managing a railroad among those who were prohibited from confining cattle, sheep, and other animals in cars more than 28 consecutive hours without unloading them for rest, water, and feeding under "An act to prevent cruelty to animals while in transit by railroad or other means of transportation," approved
48 March 3, 1873, and published in the Revised Statutes as sections 4386, 4387, 4388, and 4389. This statute forbids the confinement of stock in cars by any railroad company engaged in interstate commerce more than 28 consecutive hours, and prescribes a penalty of $500 for a violation of its provisions. The plain purpose of the act was to prohibit the confinement of stock while in transit for an unreasonable length of time. The confinement of cattle by receivers operating a railroad was as injurious as their confinement by a railroad company, and the argument for the United States was that as such acts committed by receivers were plainly within the mischief Congress was seeking to remedy, the conclusion should be that it intended to prohibit receivers, as well as railroad companies, from the commission of the forbidden acts, and hence that receivers were subject to the provisions of the law. The Supreme Court conceded that the confinement of stock in transit was within the mischief that Congress sought to remedy; but it held that, as the act did not by its terms forbid such acts when committed by receivers, it could not presume the intention of Congress to do so and import such a provision into the plain terms of the law. Mr. Justice Shiras, who delivered the unanimous opinion of the court, said: "Giving all proper force to the contention of the counsel for the Government, that there has been some relaxation on the part of the courts in applying the rule of strict construction to such statutes, it still remains that the intention of a penal statute must be found in the language actually used, interpreted according to its fair and obvious meaning. It is not permitted to courts, in this class of cases, to attribute inadvertence

or oversight to the legislature when enumerating the classes of persons who are subjected to a penal enactment, nor to depart from the settled meaning of words or phrases in order to bring persons not named or distinctly described within the supposed purpose of the statute." He cited with approval the decision of the Supreme Court in Sarlls v. United States (152 U. S., 570, 575) to the effect that lager beer was not included within the meaning of the term "spirituous liquors" in the penal statute found in section 2139 of the Revised Statutes, and closed the discussion with the following quotation from the opinion of Chief Justice Marshall in United States v. Wiltberger (5 Wheaton, 76):

"The rule that penal statutes are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislative and not in the judicial department. It is the legislature, not the court, which is to define a crime and ordain its punishment. It is said that, notwithstanding this rule, the intention of the lawmakers must govern in the construction of penal as well as other statutes. But this is not a new independent rule which subverts the old. It is a modification of the ancient maxim, and amounts to this, that though penal statutes are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be applied so as to narrow the words of the statute to the exclusion of cases
49 which those words, in their ordinary acceptation or in that sense in which the legislature ordinarily used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words there is no room for construction. The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute is within its provisions so far as to punish a crime not enumerated in the statute because it is of equal atrocity or of a kindred character with those which are enumerated. If this principle has ever been recognized in expounding criminal law it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule in other cases."

The act of March 2, 1893, is a penal statute and it changes the common law. It makes that unlawful which was innocent before its enactment and imposes a penalty recoverable by the Government. Its terms are plain and free from doubt and its meaning is clear. It declares that it is unlawful for a common carrier to use in interstate commerce a car which is not equipped with automatic couplers, and it omits to declare that it is illegal for a common carrier to use a locomotive that is not so equipped. As Congress expressed in this statute no intention to forbid the use of locomotives which were not provided with automatic couplers, the legal presumption is that it had no such intention, and provisions to import such an intention into the law and to effectuate it may not be lawfully enacted by judicial construction. The statute does not make it

unlawful to use locomotives that are not equipped with automatic couplers, in interstate commerce, and it did not modify the rule of the common law under which the plaintiff assumed the known risk of coupling such an engine to the dining car.

There are other considerations which lead to the same result. If we are in error in the conclusion already expressed, and if the word "car" in the second section of this statute means locomotive, still this case does not fall under the law, (1) because both the locomotive and the dining car were equipped with automatic couplers and (2) because at the time of the accident they were not "used in moving interstate traffic."

For the reasons which have been stated this statute may not be lawfully extended by judicial construction beyond the fair meaning of its language. There is nothing in it which requires a common carrier engaged in interstate commerce to have every car on its railroad equipped with the same kind of coupling, or which requires it to have every car equipped with a coupler which will couple automatically with every other coupler with which it may be brought into contact in the usual course of business upon a great trans-continental system of railroads. If the lawmakers had intended to require such an equipment it would have been easy for them to have said so, and the fact that they made no such requirement raises the legal presumption that they intended to make none. Nor is the reason for their omission to do so far to seek or difficult to perceive. There are several kinds or makes of practical and efficient automatic couplers. Some railroad companies use one kind, others have adopted other kinds. Couplers of each kind will couple automatically with others of the same kind or construction. But some couplers will not couple automatically with couplers of different construction. Railroad companies engaged in interstate commerce are required to haul over their roads cars equipped with all these couplers. They cannot relieve themselves from this obligation or renounce this public duty for the simple reason that their cars or locomotives are not equipped with automatic couplers which will couple with those with which the cars of other roads are provided and which will couple with equal facility with those of their kind. These facts and this situation were patent to the Congress when it enacted this statute. It must have known the impracticability of providing every car with as many different couplers as it might meet upon a great system of railroads, and it made no such requirement. It doubtless knew the monopoly it would create by requiring every railroad company to use the same coupler, and it did not create this monopoly. The prohibition of the statute goes no farther than to bar the handling of a car "not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the car." It does not bar the handling and use of a car which will couple automatically with couplers of its kind because it will not also couple automatically with couplers of all kinds, and it would be an unwarrantable extension of the terms of this law to import into it a provision to this effect. A car equipped with practical and efficient automatic couplers such as the Janney couplers or the Miller hooks, which will couple automatically with those of their kind, fully and literally complies with the terms of the law, although these couplers will not couple automatically with automatic couplers of all

kinds or constructions. The dining car and the locomotive were both so equipped. Each was provided with an automatic coupler which would couple with those of its kind as provided by the statute although they would not couple with each other. Each was accordingly equipped as the statute directs, and the defendant was guilty of no violation of it by their use.

Again the statute declares it to be unlawful for a carrier "to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped," etc. It is not then unlawful under this statute for a carrier to haul a car not so equipped which is either used in intrastate traffic solely or which is not used in any traffic at all. It would be no violation of the statute for a carrier to haul an empty car not used to move any interstate traffic from one end of its railroad to the other. It would be no violation of the law for it to haul such a car in its yards, on its side track, to put it into its trains, to move it in any manner it chose. It is only when a car is "used in moving interstate traffic" that it becomes unlawful to haul it unless it is equipped as the statute prescribes. On the day of this accident the dining car in this case was standing empty on the side track. The defendant drew it to a turntable, turned it and placed it back upon the side track. The accident occurred
51 during the performance of this act. The car was vacant when it went to the turntable and vacant when it returned. It moved no traffic on its way. How could it be said to have been "used in moving interstate traffic" either while it was standing on the side track or while it was going to and returning from the turntable? If the defendant had drawn it vacant over every foot of its railroad it would not have been engaged in moving interstate traffic and it would not have fallen under the ban of the statute. How can it thus fall because it was moved in the same way over a small portion of the road? The argument of counsel for the plaintiff is that because it had been used in moving interstate traffic on its way from San Francisco to Promontory and because it was the intention of the defendant to put it to the same use in a few hours when a west-bound train arrived, it was impressed with the use of moving such traffic in the interim. But this statute must be read not only in the light of the rules of construction to which we have adverted in the earlier part of this opinion, but also in view of the limitations upon the power of Congress in this respect. It is by virtue of the power granted to Congress to "regulate commerce among the States" and by virtue of that authority alone that this statute was enacted and has efficacy. Congress had neither the authority nor the purpose to interfere with or to touch by this act anything except commerce among the States. Is the turning of a vacant car which its owner intends to use at some future time in moving interstate traffic any part of commerce among the States? Does the intention of the owner as to a future use of an implement of transportation affect the character of the act of turning this car? If the defendant had intended to use this dining car for traffic within the State of Utah only, if it had intended to send it to the shop to be destroyed or repaired, or if, after the car was turned, it had changed its intention and concluded that it would not use it to move interstate traffic, would any of these intentions or this change of purpose have affected the act of turning the car and have impressed it with a use in interstate

commerce or intrastate commerce? The only answer to these questions is a negative one, and if this be true, then the intention of the defendant to use this car at some future time in interstate commerce would not make the act of turning it a part of such commerce, nor bring it under the ban of the act of March 2, 1893. The opinion and decision of the Supreme Court in Coe v. Errol, 116 U. S., 517, 525, 526, lend strong support to this view. In that case the owners of logs were cutting and transporting them for the purpose of exporting them from New Hampshire to Maine. The logs had been cut, drawn to, and deposited in and on the banks of Clear Stream, to be floated down that stream and down the Androscoggin River to the State of Maine, and the owners intended to transport them in this way to that State. They were lying in the town of Errol awaiting water sufficient to float them down the stream. The Supreme Court held that they had not yet become subjects of interstate commerce; that they would not become such until they were "committed to the common carrier for transportation out of the State to the State of their destination or have started on
52 their ultimate passage to that State," and that the fact that their owners intended to export them could not change their situation, because the owners might change their intention. If commodities do not become articles of interstate commerce until they start on their final passage to another State, cars and engines can not be "used in moving interstate traffic" until they receive articles of interstate traffic or start to carry them from one State to another, and the act of turning a vacant car at an intermediate station can not be the use of that car in moving such traffic. This is the effect of the decision of the supreme court of appeals of Virginia in Norfolk & Western R. Co. v. Commonwealth, 24 S. E., 838. That court held in that case, upon the authority of Coe v. Errol, that a train of empty coal cars on its way to procure a load of coal, which the carrier intended to transport with these cars from one State to another, was not engaged in interstate commerce, and would not be until it was loaded with the articles of such commerce to be carried to another State or started on the way. Speaking of the effect of the intention of the carrier to use the cars in moving interstate traffic, that court said: "The common carrier has the same right to change his mind and ship on other cars than those which he may have provided for that purpose, and the cars which were intended for that purpose may never be used. The rule fixed by the supreme court in the one case seems equally applicable to the other." United States v. Boyer, 85 Fed., 425, 432; Kelley v. Rhoads, 63 Pac., 935.

The power of Congress over this subject was limited to the regulation of commerce among the States. It intended to exercise that power, but not to transgress its bounds. It prohibited the hauling of cars used in moving interstate traffic unless equipped as the act directs. The intention to use cars for that purpose does not constitute such a use, because that intention may change. Coe v. Errol, 116 U. S., 526; Norfolk & W. R. Co. v. Commonwealth, 24 S. E., 838. The fact that such cars have been or will be so used does not constitute their use in moving interstate traffic, because the prohibition is not of the hauling of cars that have been or will be used in such traffic, but only of those used in moving that traffic. Cars loaded with articles of interstate commerce

and started toward their ultimate destination, whether in trains, in yards, or on sidetracks, may well be held to come within the terms of this statute and the intent of Congress. But vacant cars which are not and may never be so used can not be held to come within the fair import of the terms of this law, either because their owner intends to use them for that purpose at some future time or because they have been or will be so used. Empty cars in repair shops, in yards, on sidetracks, those in use to transport traffic within a State, and for that purpose alone, are not in use to move articles of interstate commerce, and do not fall under the ban of this law. Neither the empty dining car standing upon the sidetrack, nor the freight engine which was used to turn it at the little station in Utah, were then used in moving interstate traffic within the meaning of this statute, and this case did not fall within the provisions of this law. The judgment below must accordingly be affirmed, and it is so ordered.

53 Thayer, circuit judge:

I am unable to concur in the conclusion announced by the majority of the court, that the act of Congress of March 2, 1893 (27 St. 531, c. 196), does not require locomotive engines to be equipped with automatic couplers; and I am equally unable to concur in the other conclusion announced by my associates, that the dining car in question, at the time of the accident, was not engaged or being used in moving interstate traffic.

In my judgment it is a very technical interpretation of the provisions of the act in question, and one which is neither in accord with its spirit nor with the obvious purpose of the lawmaker, to say that Congress did not intend to require engines to be equipped with automatic couplers. The statute is remedial in its nature; it was passed for the protection of human life, and there was certainly as much, if not greater, need that engines should be equipped to couple automatically, as that ordinary cars should be so equipped, since engines have occasion to make couplings more frequently. In my opinion, the true view is that engines are included by the words "any car" as used in the second section of the act. The word "car," is generic and may well be held to comprehend a locomotive or any other similar vehicle which moves on wheels; and especially should it be so held in a case like the one now in hand, where no satisfactory reason has been assigned or can be given, which would probably have influenced Congress to permit locomotives to be used without automatic coupling appliances.

I am also of the opinion that within the fair intent and import of the act, the dining car in question, at the time of the accident, was being hauled or used in interstate traffic. The reasoning by which a contrary conclusion is reached seems to me to be altogether too refined and unsatisfactory to be of any practical value. It was a car which, at the time, was employed in no other service than to furnish meals to passengers between Ogden and San Francisco. It had not been taken out of that service, even for repairs, or for any other use, when the accident occurred, but was engaged therein to the same extent that it would have been if it had been hauled through to Ogden, and if the accident had there occurred, while it was being turned to make the return trip to San Francisco. The cars composing a train which is regularly employed in interstate traffic

ought to be regarded as used in that traffic while the train is being made up, with a view to an immediate departure on an interstate journey, as well as after the journey has actually begun. I accordingly dissent from the conclusion of the majority of the court on this point.

While I dissent on the foregoing propositions, I concur in the other view which is expressed in the opinion of the majority, to the effect that the case discloses no substantial violation of the provisions of the act of Congress, because both the engine and the dining car were equipped with automatic coupling appliances. In this respect the case discloses a compliance with the law, and the ordinary rule governing the liability of the defendant company should be applied. The difficulty was, that the car *and engine were equipped with couplers of a different pattern, which*
would not couple for that reason without a link. Janney couplers
54 and Miller couplers are in common use on the leading railroads of the country, and Congress did not see fit to command the use of either style of automatic coupler to the exclusion of the other, while it must have foreseen that, owing to the manner in which cars were ordinarily handled and exchanged, it would sometimes happen, as in the case at bar, that cars having different styles of automatic couplers would necessarily be brought in contact in the same train. It made no express provision for such an emergency, but declared generally that after a certain date cars should be provided with couplers coupling automatically. The engine and dining car were so equipped in the present instance, and there was no such violation of the provisions of the statute as should render the defendant company liable to the plaintiff, by virtue of the provisions contained in the eighth section of the act. In other words, the plaintiff assumed the risk of making the coupling, in the course of which he sustained the injury. On this ground I concur in the order affirming the judgment below.

Filed August 28, 1902.

55 JUDGMENT.

And on the twenty-eighth day of August, A. D. 1902, in the record of the proceedings of said circuit court of appeals is a judgment in said cause, in the words and figures following, to wit:

United States circuit court of appeals, eighth circuit, May term, 1902.

THURSDAY, *August 28, 1902.*

W. O. JOHNSON, PLAINTIFF IN ERROR,
vs.
SOUTHERN PACIFIC COMPANY. } No. 1722.

In error to the circuit court of the United States for the district of Utah.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Utah, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and

the same is hereby, affirmed with costs; and that the Southern Pacific Company have and recover against W. O. Johnson the sum of twenty dollars for its costs herein and have execution therefor.

August 28, 1902.

56 *Clerk's certificate.*

United States circuit court of appeals, eighth circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing fifty-six pages contain a full, true, and complete transcript of all the pleadings, proceedings, and record entries (except the proceedings and papers filed on the writ of error from the Supreme Court) in a certain cause wherein W. O. Johnson was plaintiff in error and the Southern Pacific Company was defendant in error, No. 1722, May term, 1902, as full, true, and complete as the same remain on file and of record in my office.

I do further certify that the mandate in said cause was issued to the circuit court of the United States for the district of Utah on the first day of November, A. D. 1902.

In testimony whereof I hereunto subscribe my name and affix the seal of said circuit court of appeals, at office in the city of St. Louis, Missouri, in the eighth circuit, this eleventh day of July, A. D. 1903.

[SEAL.] JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

57 (Indorsed:) File No., 18929. Supreme Court U. S., October term, 1903. Term No., 279. W. O. Johnson, petitioner, vs. Southern Pacific Company. Writ of certiorari and return thereto. Filed July 13th, 1903.

58 In the Supreme Court of the United States, October term, 1903.

W. O. JOHNSON, PETITIONER,
vs.
THE SOUTHERN PACIFIC COMPANY. } No. 279.

On a writ of certiorari to the U. S. circuit court of appeals for the eighth circuit.

W. O. JOHNSON, PLAINTIFF IN ERROR,
vs.
THE SOUTHERN PACIFIC COMPANY. } No. 362.

In error to the U. S. circuit court of appeals for the eighth circuit.

Stipulation as to printing of records.

Come now the parties to the above-entitled causes, by their counsel, and stipulate that the transcript of the record in case No. 279, W. O. Johnson, petitioner, vs. The Southern Pacific Company, shall be printed;

that the record in case No. 362, W. O. Johnson, plaintiff in error, vs. The Southern Pacific Company, shall not be printed, except the portions thereof constituting the writ of error and other proceedings subsequent thereto; that both cases shall be submitted to and considered by the court upon such printed record and this stipulation, and that this stipulation shall in no way prejudice the rights of the defendant in error in No. 362 or affect its right to object to the jurisdiction of the court in that case on the writ of error.

59

L. A. SHAVER,
Counsel for Petitioner in No. 279 and Plaintiff in Error in No. 362.
MAXWELL EVARTS,
Counsel for Respondent in No. 279 and Defendant in Error in No. 362.

60 (Indorsed:) Supreme Court of the U. S., October term, 1903. W. O. Johnson, petitioner, vs. Southern Pacific Company, No. 279. W. O. Johnson, plaintiff in error, vs. The Southern Pacific Company, No. 362. Stipulation as to printing records. Maxwell Evarts, counsel for respondent in No. 279 and defendant in error in No. 362, 120 Broadway, Borough of Manhattan, New York City.

61 (Indorsed:) File Nos., 18929 & 19013. Supreme Court U. S., October term, 1903. Term Nos., 279 & 362. W. O. Johnson, petitioner, vs. Southern Pacific Co., and W. O. Johnson, plff. in error, vs. Southern Pacific Co. Stipulation as to printing records. Filed Nov. 18th, 1903.

O

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1904

No. 887.

W. O. JOHNSON, PLAINTIFF IN ERROR,

vs.

SOUTHERN PACIFIC COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED JULY 19, 1904.

(19013.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 362.

W. O. JOHNSON, PLAINTIFF IN ERROR,

vs.

SOUTHERN PACIFIC COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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* * * * * * *

55 *Assignment of errors.*

And on the eighth day of June, A. D. 1903, an assignment of errors was filed in the clerk's office of said circuit court of appeals in words and figures following, to wit:

United States circuit court of appeals for the eighth circuit.

W. O. JOHNSON, PLAINTIFF,
vs.
SOUTHERN PACIFIC COMPANY,
defendant.
} No. 1722. Assignment of error.

On a judgment of the United States circuit court of appeals for
56 the eighth circuit, in the May term, 1902, of said court, wherein the said W. O. Johnson was plaintiff and the said Southern Pacific Company was defendant, the said plaintiff assigns the following as error of the said court in the decisions of said cause:

That the said court erred in the construction and application of the act of Congress of the United States of March 2nd, A. D. 1893, in relation to couplings on cars used by common carriers in interstate commerce, entitled "An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes." And that the said judgment should have been in favor of plaintiff in error instead of in favor of defendant in error.

That the said court erred in rendering judgment against this plaintiff in error.

The above errors are respectfully submitted. Dated this 13th day of March, 1903.

W. L. MAGINNIS,
Attorney for Plaintiff.

(Endorsed:) No. 1722. W. O. Johnson, plaintiff in error, vs. Southern Pacific Company. Assignment of errors. Filed Jun. 8, 1903. John D. Jordan, clerk.

Petition for writ of error.

And on the eighth day of June, A. D. 1903, there was filed in the clerk's office of said circuit court of appeals a petition for writ of error in said cause in words and figures following, to-wit:

In the Supreme Court of the United States.

W. O. JOHNSON, PLAINTIFF,
vs.
SOUTHERN PACIFIC COMPANY,
defendant.
} Petition for writ of error.

Now comes the plaintiff, W. O. Johnson, and says that he is a resident of the State of Utah and county of Weber; that on the 28th day of

August, A. D. 1902, a judgment was rendered by the United States circuit court of appeals for the eighth circuit in favor of the defendant,
57 Southern Pacific Company (which is a corporation organized and existing under and by virtue of the laws of the State of Kentucky, and operating a railroad in the State of Utah and county of Weber) and against this plaintiff, by which this plaintiff was aggrieved, in that the said judgment was erroneous and contrary to law and greatly to the prejudice of this plaintiff, as more fully appears herein and in a copy of the record in said action and in an assignment of error filed in said cause in said United States circuit court of appeals for the eighth circuit, all of which are hereto attached.

That the said cause above entitled was commenced in the district court of the first judicial district of the State of Utah, in and for Box Elder County, and removed therefrom by the defendant above named into the circuit court of the United States for the district of Utah and thence by appeal to the United States circuit court of appeals for the eighth circuit.

That the said cause arose out of a personal injury received by the plaintiff while attempting to couple two cars together, and was brought under the act of Congress of the United States of March 2nd, 1893, relative to couplings on cars used in interstate commerce, and that the construction of the said act is in question, and that the said United States circuit court of appeals erred in rendering judgment in favor of said defendant.

The amount involved exceeds the sum of $2,000.00.

Wherefore plaintiff prays that a writ of error may issue to the United States circuit court of appeals for the eighth circuit for the correction of the error complained of, and that a duly authenticated transcript of the record, proceedings, and papers herein may be sent to the said Supreme Court of the United States.

Dated this 4th day of June, 1903.

W. O. JOHNSON.

Allowed.

H. B. BROWN,

Associate Justice Supreme Court of the United States.

June 4, 1903.

(Endorsed:) No. 1722. W. O. Johnson, plaintiff in error, vs. Southern Pacific Company. Petition for writ of error. Filed Jun. 8, 1903. John D. Jordan, clerk.

58 *Bond on writ of error.*

And on the eighth day of June, A. D. 1903, there was filed in the clerk's office of said circuit court of appeals, in said cause, a bond on writ of error, in words and figures following, to wit:

Know all men by these presents, that we, W. O. Johnson, as principal, and The United States Fidelity and Guaranty Company, as sureties, are held and firmly bound unto Southern Pacific Company in the full and just sum of three hundred 00/000 dollars, to be paid to the said Southern Pacific Company's certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our

heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 21st day of February in the year of our Lord one thousand nine hundred and .

Whereas lately at a term of the United States circuit court of appeals for the eighth circuit, in a suit depending in said court between W. O. Johnson, plaintiff in error, and Southern Pacific Company, defendant in error, a judgment was rendered against the said W. O. Johnson, plaintiff in error, and the said W. O. Johnson, plaintiff in error, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Southern Pacific Company citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within days from the date thereof:

Now, the condition of the above obligation is such that if the said W. O. Johnson, plaintiff in error, shall prosecute said appeal to effect, and answer all damages and costs if he fail to make plea good, then the above obligation to be void; else to remain in full force and virtue.

W. O. JOHNSON. [SEAL.]
THE UNITED STATES FIDELITY AND GUARANTY COMPANY. [SEAL.]
By J. M. FORRISTALL,
H. H. HENDERSON,
Attys. in Fact.

Signed, sealed, and delivered in presence of—
CHAS. STONT.
Approved by—
BROWN,
Associate Justice of the Supreme Court of the United States.

59 (Endorsed:) No. 1722. W. O. Johnson, plaintiff in error, vs. Southern Pacific Company. Bond on writ of error. Filed Jun. 8, 1903. John D. Jordan, clerk.

Writ of error.

And on the eighth day of June, A. D. 1903, a writ of error was filed in the clerk's office of said circuit court of appeals, in said cause, the original of which, with my return thereto, is hereto attached and herewith returned.

60 UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals before you, or some of you, between W. O. Johnson, plaintiff in error, and the Southern Pacific Company, defendant in error, a manifest error hath happened, to the great damage of the said W. O. Johnson, plaintiff in error, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the

parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the United States, the 5th day of June, in the year of our Lord one thousand nine hundred and three.

[SEAL.] JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
H. B. BROWN,
Associate Justice of the Supreme Court of the United States.

61 *Return to writ.*

UNITED STATES OF AMERICA,
Eighth Circuit, ss:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereto subscribe my name, and affix the seal of the United States circuit court of appeals for the eighth circuit, at office in the city of St. Louis, Missouri, this eighteenth day of June, A. D. 1903.

[SEAL.] JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Indorsed:) No. 1722. W. O. Johnson, plaintiff in error, vs. Southern Pacific Company. Writ of error. Filed Jun' 8, 1903. John D. Jordan, clerk.

62 *Clerk's certificate.*

United States circuit court of appeals, eighth circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing sixty-two pages contain full, true, and complete copies of all the pleadings, proceedings, and record entries, including the opinion of said circuit court of appeals, in a certain cause wherein W. O. Johnson was plaintiff in error and the Southern Pacific Company was defendant in error, No. 1722, May term, 1902, as full, true, and complete as the same remain on file and of record in my office.

I do further certify that the mandate in said cause was issued to the circuit court of the United States for the district of Utah on the first day of November, A. D. 1902.

I do further certify that the original writ of error, with my return endorsed thereon, is hereto attached and herewith returned.

In testimony whereof I hereunto subscribe my name and affix the seal of said circuit court of appeals, at office in the city of St. Louis, Missouri, in the eighth circuit, this eighteenth day of June, A. D. 1903.

[SEAL.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

63 UNITED STATES OF AMERICA, ss:

To Southern Pacific Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the eighth circuit, wherein W. O. Johnson is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the honorable Henry B. Brown, Associate Justice of the Supreme Court of the United States, this 5th day of June, in the year of our Lord one thousand nine hundred and three.

H. B. BROWN,
Associate Justice of the Supreme Court of the United States.

64 On this 19th day of June, in the year of our Lord one thousand nine hundred and three, personally appeared L. H. Smyth before me, the subscriber, clerk of the U. S. dist. court for the dist. of Utah, and makes oath that he delivered a true copy of the within citation to Thomas Marshall, attorney and designated agent for the State of Utah of the Southern Pacific Company.

Sworn to and subscribed the 19 day of June, A. D. 1903.

[SEAL.]

JERROLD R. LITCHER,
Clerk U. S. dist. court dist. Utah.

(Indorsed:) No. 1722. W. O. Johnson, plaintiff in error, vs. Southern Pacific Company.

Citation.

I hereby certify and return that I served the within citation on the therein-named defendant, Southern Pacific Company, by delivering a true copy thereof to Thomas Marshall, its attorney and designated agent for the State of Utah, on whom processes may be served, at Salt Lake City, in the district of Utah, on the 19th day of June, 1903.

B. B. HEYWOOD,
U. S. Marshal.

By L. H. SMYTH,
Chief Deputy.

65 In the Supreme Court of the United States, October term, 1903.

W. O. JOHNSON, PETITIONER,
vs.
THE SOUTHERN PACIFIC COMPANY. } No. 279.

On writ of certiorari to the U. S. circuit court of appeals for the eighth circuit.

W. O. JOHNSON, PLAINTIFF IN ERROR,
vs.
THE SOUTHERN PACIFIC COMPANY. } No. 362.

In error to the U. S. circuit court of appeals for the eighth circuit.

Stipulation as to printing of records.

Come now the parties to the above-entitled causes, by their
66 counsel, and stipulate that the transcript of the record in case No. 279, W. O. Johnson, petitioner, vs. The Southern Pacific Company, shall be printed; that the record in case No. 362, W. O. Johnson, plaintiff in error, vs. The Southern Pacific Company, shall not be printed, except the portions thereof constituting the writ of error and other proceedings subsequent thereto; that both cases shall be submitted to and considered by the court upon such printed record and this stipulation; and that this stipulation shall in no way prejudice the rights of the defendant in error in No. 362 or affect its right to object to
67 the jurisdiction of the court in the case on the writ of error.

(Signed) L. A. SHAVER,
Counsel for Petitioner in No. 279 and Plaintiff in Error in No. 362.

(Signed) MAXWELL EVARTS,
Counsel for Respondent in No. 279 and Defendant in Error in No. 362.

(Indorsed:) Supreme Court of the U. S., October term, 1903. W. O. Johnson, petitioner, vs. Southern Pacific Company, No. 279. W. O. Johnson, plaintiff in error, vs. The Southern Pacific Company, No. 362. Stipulation as to printing records. Maxwell Evarts, counsel for respondent in No. 279 and defendant in error in No. 362, 120 Broadway, Borough of Manhattan, New York City. File Nos. 18929 &
68 19013. Supreme Court U. S., October term, 1903. Term Nos., 279 and 362. W. O. Johnson, petitioner, vs. Southern Pacific Co. and W. O. Johnson, plff. in error, vs. Southern Pacific Co. Stipulation as to printing records. Filed November 18, 1903.

69 (Indorsement on cover:) File No. 19013. U. S. circuit court of appeals, 8th circuit. Term No., 362. W. O. Johnson, plaintiff in error, vs. Southern Pacific Company. Filed July 16th, 1903.

O

FILE COPY.

Office Supreme Court U.S.
FILED
MAY 13 1903
JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

32

W. O. JOHNSON, PETITIONER,
v.
SOUTHERN PACIFIC COMPANY.
No. ~~901~~ 272

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

W. O. JOHNSON, PETITIONER,
v.
SOUTHERN PACIFIC COMPANY. } No. ——.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

On October 6, 1900, the petitioner filed his complaint in the first judicial district court of the State of Utah, in and for Box Elder County, against the Southern Pacific Company, a corporation of the State of Kentucky. The complaint alleged that that company was engaged in operating a railroad between the city of San Francisco, Cal., and the city of Ogden, Utah, as a common carrier engaged in interstate commerce, and was, on the 5th day of August, 1900, hauling and using on its line a certain locomotive engine; that on August 5, 1900, in the daytime, the petitioner was acting as head brakeman in the employ of the company upon a train composed of freight cars and the locomotive above mentioned, which were at the time being used in moving interstate traffic, and said train entered the town of Promontory, Utah, and thereupon the defendant company ordered and directed the plaintiff to uncouple the engine from the train upon which he was

working, which he did accordingly, and to couple the engine to a certain dining car, also used in moving interstate traffic, which was standing at the time in the yards of the company in the town of Promontory; that the engine was equipped with what is known as the "Janney" coupler, and that the dining car was equipped with what is commonly known as the "Miller hook" coupler, which two different kinds of couplers were not couplers which, acting together, would couple automatically by impact, and therefore had to be coupled by hand by a person passing between the ends of the car and engine and uniting the same by means of a link and pin; that it was the duty of the company to furnish its cars and locomotives with coupling appliances, automatic in their character, which would couple automatically by impact and not necessitate a brakeman going between the cars to couple the same; that the condition of said cars was known to the company, and that said engine and cars were negligently and carelessly used, operated, and maintained for a long period of time before said accident, by reason of which negligence and carelessness the plaintiff was injured; that the defendant company ordered and directed the plaintiff to couple the engine with the dining car, and in order to do so he was obliged to use a link and pin and pass in between the dining car and the moving engine, which he did, and while endeavoring to couple together the engine and dining car with the link and pin, with all due care, and with no fault or negligence on his part, his left hand and arm were caught between

the couplers and ends of the dining car and moving engine, thereby bruising and crushing the same and rendering it useless and diseased, and necessitating the amputation of his hand and forearm; that the Miller hook coupler on the dining car was out of order, which fact made it more difficult and dangerous to effect the coupling between the car and the engine than it otherwise would have been; that the company knew, or with reasonable diligence and care could have known, that the Miller hook coupler was out of repair; that plaintiff did not know the same was out of order, nor had he any means of obtaining such knowledge; that the plaintiff was a strong, healthy, able-bodied man, of the age of 33 years, and earning $90 per month; that by reason of the injury plaintiff was in the hospital for two months, and lost his hand and forearm and suffered great bodily and mental suffering and expense, and with a likelihood of further expense and suffering by having to undergo another amputation of the arm on account of its shattered condition; that by the wrongful act of the defendant company the plaintiff was rendered a cripple for life and unable to perform manual labor, and that he suffered damage thereby in the sum of $20,000.

On October 30, 1900, the defendant filed a petition for the removal of the cause to the Circuit Court of the United States for the district of Utah, and the cause was accordingly removed to that court.

The answer of the defendant company denied that the locomotive and dining car in question were being

used in interstate traffic, or that it was the duty of the defendant, at or prior to said attempt to couple, to equip the latter with an automatic coupling device; denied that it knew the dining car had not a reasonably safe and satisfactory coupler; admitted its ignorance of the condition of the dining car, but alleged that it was the duty of the plaintiff to examine the couplings between the engine and dining car, and, if the same were defective, not to obey the order to couple the same, but to report the fact to the conductor or yard master; that it did not know that the Miller hook coupler was out of repair; denied that with reasonable diligence and care it could have known that the Miller hook coupler was out of repair, and alleged that it could only know of such defect or want of repair through its employees who did the coupling; that it was the duty of plaintiff, in case of any such difficulty as alleged, not to make the coupling, but to report such difficulty to the defendant; denied that by any negligence or want of due care on the part of defendant plaintiff was in the hospital for two months and suffered great bodily and mental suffering and expense, etc.

For a further and separate answer, the company alleged that plaintiff had been in its employ for about six years in various capacities, and had been furnished with certain printed rules and regulations of the company, applicable to persons employed in any service on trains, and, among other things, enjoining care in the coupling of cars and engines, etc.; that on August

5, 1900, said dining car had been standing still and alone in the yards of defendant at Promontory; that plaintiff had ample opportunity to examine and know, and did know, the condition of the coupler on said dining car before attempting to couple the same to the engine, and it became his duty, under said rules, not to make the coupling but to report the defects in the dining-car coupler to the conductor or yardmaster of the defendant; that in violation of his duty he wilfully and carelessly assumed the risk of attempting to make the coupling, and thereby, with no negligence or carelessness of the defendant, suffered the injuries complained of by him.

The case came on for trial on June 28, 1901, and on June 29, after the plaintiff had submitted evidence in support of the facts alleged in his complaint, the defendant company, without offering any evidence on its part, moved the court to instruct the jury to render a verdict in its favor, which motion was granted by the court and judgment accordingly entered.

On error from the Circuit Court of Appeals for the Eighth Circuit, that court affirmed the judgment of the Circuit Court. (117 Fed. Rep., 462.)

No evidence having been offered by the defendant to refute that adduced by the plaintiff, the case turned upon the construction of the act of March 2, 1893 (27 Stats., 531), entitled "An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and con-

tinuous brakes, and their locomotives with driving wheel brakes, and for other purposes," which provides:

> SECTION 1. That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system. * * *
>
> SEC. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars. * * *
>
> SEC. 6. That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act shall be liable to a penalty of one hundred dollars for each and every such violation. * * *
>
> SEC. 8. That any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provisions of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge.

The Circuit Court of Appeals held that the act in question does not make it unlawful for common carriers to use locomotives engaged in interstate commerce which are not equipped with automatic couplers; that the equipment of a car with automatic couplers, which will couple automatically with those of the same kind of make is a compliance with that act; that the act does not require cars used in interstate commerce to be equipped with couplers which will couple automatically with cars equipped with couplers of other makes; that cars loaded with articles shipped to other States and started, whether in yards, on side tracks, or in trains, are used in moving interstate traffic, but that "vacant cars in yards, on side tracks, in repair shops, or in trains which are not loaded with, or in use to move articles of, interstate commerce, do not fall within the terms or meaning of the act;" and that "a dining car standing empty on the side track at an intermediate station where it had been left by a train engaged in interstate traffic until it should be taken by another train engaged in the same traffic, going in an opposite direction, and which the owner intended to use in interstate traffic," which was "drawn by a freight engine from the side track to the turntable, turned, and placed again upon the side track," was not used in moving interstate traffic while it was on the side track and while it was being turned.

Copies of the transcript of the record, including a copy of the opinion of the Circuit Court of Appeals, are filed herewith as a part of this petition.

Petitioner submits that the Circuit Court of Appeals misconstrued the act of March 2, 1893; that upon a reasonable construction of section 2 of said act, "It shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any *car* used in moving interstate traffic not equipped with couplers coupling automatically by impact," the word "car" includes a locomotive or, at least, the *tender* thereof, "tender" being defined by Webster (International Dictionary) as "a car attached to a locomotive for carrying a supply of fuel and water," which tender or car he was required to couple to the dining car.

The construction that the equipment of cars used in interstate traffic with any make of automatic coupler, even though it will not couple automatically by impact with a coupler of another make, but only with one of the same type, practically nullifies the provisions of the act, which was designed for the protection of the lives of those engaged in the railroad service, as well as of the general public. Whether the Miller hook coupler was in good order or not is not material—for the violation of law consisted in using cars equipped with couplers which would not couple by impact, and to couple different types of automatic couplers was more dangerous than the old method of coupling which the law intended should be superseded. It is submitted that such construction should be given to the act as to accomplish, if possible, the purpose of Congress in its enactment.

It is further contended, on behalf of the petitioner,

that the dining car in question, at the time the injury occurred, was engaged in interstate traffic; that it had been dropped from a train running from San Francisco to Ogden at Promontory for the purpose only of being turned and attached to another train proceeding to San Francisco; and that a car ordinarily and commonly engaged in interstate traffic does not cease to be so engaged the moment it is brought to rest and detached from an interstate train. The car in question had not been taken out of the service between San Francisco and Ogden.

Manifest error having been committed by the Circuit Court of Appeals, to the great injury of the petitioner, and the case being one of great public importance, the question when a car is engaged in interstate commerce being involved, and many similar cases having arisen under the act, there being also a conflict of decision as to its meaning (see *Mallott, Receiver of T. H. & I. R. R. Co.*, v. *Hood*, 99 Ill. App., 360; *Fleming* v. *Southern Railway Co.*, 131 N. C., 476; *Winkler* v. *Phil. & R. Ry. Co.*, 53 Atl., 90; *Voelker* v. *Chicago, M. & St. P. Ry. Co.*, 116 Fed. Rep., 867), the issuance of a writ of certiorari to correct its judgment is accordingly prayed.

W. L. MAGINNIS,
Counsel for Petitioner.
L. A. SHAVER.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

W. O. JOHNSON, PETITIONER,
v.
THE SOUTHERN PACIFIC COMPANY. } No. ——.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

SUGGESTION BY THE UNITED STATES.

In a letter received from the Interstate Commerce Commission the Attorney-General is requested to ask leave to intervene in this case. The Commission say:

> In *Johnson* v. *Southern Pacific Company* the eighth circuit court of appeals held that the equipment of a car with automatic couplers which will couple automatically with those of the same kind is compliance with the safety-appliance act of March 2, 1893, and that the act does not require cars used in interstate commerce to be equipped with couplers which will couple automatically with cars equipped with automatic couplers of other makes. If this ruling should be upheld on appeal, it would have the effect of nullifying a main object of the

statute, which is to secure such uniformity in applied automatic coupling devices as to permit all cars in a train to be coupled and uncoupled without requiring men to go between the cars. The act, in terms, prohibits any carrier from hauling or permitting to be "hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars." Carriers are left free by the statute to use any kind of automatic coupler they see fit, the sole and governing restriction being that, whatever kind of coupler may be used, no cars shall be hauled or used on the line which do not couple automatically by impact, or can not be uncoupled without men going between the cars; and this applies to the hauling of all cars, whether owned by the carrier operating the road or by other carriers. Plainly, if carriers use different types of couplers which do not work automatically with each other, the law is violated when a carrier undertakes to haul two cars so equipped in the same train. This was pointed out by the Commission in its report to Congress for the year 1893, and has been generally understood and followed by carriers throughout the country.

The above-mentioned ruling of the court of appeals in this case is in conflict with that construction of the statute, and it would, if finally affirmed, permit the use of many different types of couplers, each type working automatically with those of the same description, but not with any other, and authorize the haul-

ing of cars in the same train, which could not be coupled or uncoupled without the aid of men going between the cars. Other rulings in this case contrary to generally accepted construction are that the act does not apply to empty cars or to any car not at the time actually loaded with and engaged in interstate traffic; and, by clear inference, that the law has no application to locomotive tenders.

This case was probably presented to the court with main reference to facts relating to the plaintiff's claim for damage, and with but little attention to the great interests of railway employees and the public generally in an interpretation of the law involving the hauling of cars in the same train not equipped with couplers coupling automatically with each other.

The court will perceive that this case is one of great public importance, and under the decisions justifies the issuance of a writ of certiorari. It is true the question as to whether the word "car" includes a locomotive or its tender is settled by the recent act of Congress of March 2, 1903 (33 Stats., 943), which goes into effect September 1, 1903. But a great many cases are pending under the original act, and there has been a contrariety of decision by the State and Federal courts as to its meaning. (See *Mallott, Receiver of T. H. and I. R. R. Co.* v. *Hood*, 99 Ill. App., 360; *Fleming* v. *Southern Railway Co.*, 131 N. C., 476; *Winkler* v. *Philadelphia and Reading Ry. Co.*, 53 Atl., 90.) It is also to be noted that the question when a railroad car may be said to be engaged in

interstate commerce, also passed upon by the circuit court of appeals, is not affected by the later act. (See also *Voelker* v. *Chicago, M. & St. P. Ry. Co.*, 116 Fed. Rep., 867.)

This question is one of grave concern to the United States, not only with reference to the safety-appliance acts, but in the general control of interstate commerce by Congress.

For the convenience of the court, I quote somewhat at length from the opinion of the circuit court of appeals so far as it relates to the question of the use of cars in interstate commerce. That court said:

> Again, the statute declares it to be unlawful for a carrier "to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped," etc. It is not, then, unlawful, under this statute, for a carrier to haul a car not so equipped which is either used in interstate traffic solely *or which is not used in any traffic at all. It would be no violation of the statute for a carrier to haul an empty car not used to move any interstate traffic from one end of its railroad to the other.* It would be no violation of the law for it to haul such a car in its yards, on its side track, to put it into its trains, to move it in any manner it chose. It is only when a car is "used in moving interstate traffic" that it becomes unlawful to haul it unless it is equipped as the statute prescribes. On the day of this accident the dining car in this case was standing empty on the side track. The defendant drew it to a turntable, turned it, and placed it back upon the side track. The acci-

dent occurred during the performance of this act. The car was vacant when it went to the turntable, and vacant when it returned. It moved no traffic on its way. How could it be said to have been "used in moving interstate traffic," either while it was standing on the side track or while it was going to and returning from the turntable? If the defendant had drawn it vacant over every foot of its railroad, it would not have been engaged in moving interstate traffic, and it would not have fallen under the ban of the statute. How can it thus fall because it was moved in the same way over a small portion of the road? The argument of counsel for the plaintiff is that because it had been used in moving interstate traffic on its way from San Francisco to Promontory, and because it was the intention of the defendant to put it to the same use in a few hours, when a west-bound train arrived, it was impressed with the use of moving such traffic in the interim. But this statute must be read not only in the light of the rules of construction to which we have adverted in the earlier part of this opinion, but also in view of the limitations upon the power of Congress in this respect. It is by virtue of the power granted to Congress to "regulate commerce among the States," and by virtue of that authority alone, that this statute was enacted and has efficacy. Congress had neither the authority nor the purpose to interfere with or to touch by this act anything except commerce among the States. Is the turning of a vacant car which its owner intends to use at some future time in moving interstate

traffic any part of commerce among the States? Does the intention of the owner as to a future use of an implement of transportation affect the character of the act of turning this car? If the defendant had intended to use this dining car for traffic within the State of Utah only, if it had intended to send it to the shop to be destroyed or repaired, or if, after the car was turned, it had changed its intention and concluded that it would not use it to move interstate traffic, would any of these intentions or this change of purpose have affected the act of turning the car, and have impressed it with a use in interstate commerce or intrastate commerce? The only answer to these questions is a negative one, and, if this be true, then the intention of the defendant to use this car at some future time in interstate commerce would not make the act of turning it a part of such commerce, nor bring it under the ban of the act of March 2 1893. The opinion and decision of the Supreme Court in *Coe* v. *Town of Errol* (116 U. S., 517, 525, 526; 6 Sup. Ct., 475; 29 L. Ed., 715) lend strong support to this view. In that case the owners of logs were cutting and transporting them for the purpose of exporting them from New Hampshire to Maine. The logs had been cut, drawn to, and deposited in and on the banks of Clear Stream, to be floated down that stream and down the Androscoggin River to the State of Maine, and the owners intended to transport them in this way to that State. They were lying in the town of Errol, awaiting water sufficient to float them down the stream. The Supreme

Court held that they had not yet become subjects of interstate commerce; that they would not become such until they were "committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State;" and that the fact that their owners intended to export them could not change their situation, because the owners might change their intention. If commodities do not become articles of interstate commerce until they start on their final passage to another State, cars and engines can not be "used in moving interstate traffic" until they receive articles of interstate traffic, or start to carry them from one State to another, and the act of turning a vacant car at an intermediate station can not be the use of that car in moving such traffic. This is the effect of the decision of the supreme court of appeals of Virginia in *Norfolk and W. R. Co.* v. *Com.* (24 S. E., 838; 34 L. R. A., 105; 57 Am. St. Rep., 827). That court held in that case, upon the authority of *Coe* v. *Errol*, that a train of empty coal cars on its way to procure a load of coal which the carrier intended to transport with these cars from one State to another was not engaged in interstate commerce, and would not be until it was loaded with the articles of such commerce, to be carried to another State or started on the way. Speaking of the effect of the intention of the carrier to use the cars in moving interstate traffic, that court said:

"The common carrier has the same right to change his mind, and ship on other cars than those which he may have provided for that

purpose, and the cars which were intended for that purpose may never be used. The rule fixed by the Supreme Court in the one case seems equally applicable to the other. (*U. S.* v. *Boyer*, D. C., 85 Fed., 425, 432; *Kelley* v. *Rhoads*, Wyo., 63 Pac., 935.)"

The power of Congress over this subject was limited to the regulation of commerce among the States. It intended to exercise that power, but not to transgress its bounds. It prohibited the hauling of cars used in moving interstate traffic unless equipped as the act directs. The intention to use cars for that purpose does not constitute such a use, because that intention may change. (*Coe* v. *Town of Errol*, 116 U. S., 526; 6 Sup. Ct., 475; 29 L. Ed., 715; *Norfolk and W. R. Co.* v. *Com.*, Va., 24 S. E., 838; 34 L. R. A., 105; 57 Am. St. Rep., 827.) The fact that such cars have been or will be so used does not constitute their use in moving interstate traffic, because the prohibition is not of the hauling of cars that have been or will be used in such traffic, but only of those used in moving that traffic. Cars loaded with articles of interstate commerce, and started toward their ultimate destination, whether in trains, in yards, or on side tracks, may well be held to come within the terms of this statute and the intent of Congress. But vacant cars which are not and may never be so used can not be held to come within the fair import of the terms of this law either because their owner intends to use them for that purpose at some future time or because they have been or will be so used. Empty cars in repair shops, in

> yards, on side tracks, those in use to transport traffic within a State, and for that purpose alone, are not in use to move articles of interstate commerce, and do not fall under the ban of this law. Neither the empty dining car standing upon the side track nor the freight engine which was used to turn it at the little station in Utah was then used in moving interstate traffic, within the meaning of this statute, and this case did not fall within the provisions of this law.

Judge Thayer, who dissented from the judgment of the court, said:

> I am unable to concur in the conclusion, announced by the majority of the court, that the act of Congress of March 2, 1893 (27 Stat., 531, c. 196), does not require locomotive engines to be equipped with automatic couplers; and I am equally unable to concur in the other conclusion announced by my associates that the dining car in question at the time of the accident was not engaged or being used in moving interstate traffic.
>
> In my judgment, it is a very technical interpretation of the provisions of the act in question, and one which is neither in accord with its spirit nor with the obvious purpose of the lawmaker, to say that Congress did not intend to require engines to be equipped with automatic couplers. The statute is remedial in its nature; it was passed for the protection of human life, and there was certainly as much, if not greater, need that engines should be equipped to couple automatically, as that ordinary cars should be so equipped, since engines have occasion to

make couplings more frequently. In my opinion, the true view is that engines are included by the words "any car," as used in the second section of the act. The word "car" is generic, and may well be held to comprehend a locomotive or any other similar vehicle which moves on wheels; and especially should it be so held in a case like the one now in hand, where no satisfactory reason has been assigned or can be given which would probably have influenced Congress to permit locomotives to be used without automatic coupling appliances.

I am also of opinion that, within the fair intent and import of the act, the dining car in question at the time of the accident was being hauled or used in interstate traffic. The reasoning by which a contrary conclusion is reached seems to me to be altogether too refined and unsatisfactory to be of any practical value. It was a car which at the time was employed in no other service than to furnish meals to passengers between Ogden and San Francisco. It had not been taken out of that service, even for repairs or for any other use, when the accident occurred, but was engaged therein to the same extent that it would have been if it had been hauled through to Ogden, and if the accident had there occurred while it was being turned to make the return trip to San Francisco. The cars composing a train which is regularly employed in interstate traffic ought to be regarded as used in that traffic while the train is being made up with a view to an immediate departure on an interstate journey as well as

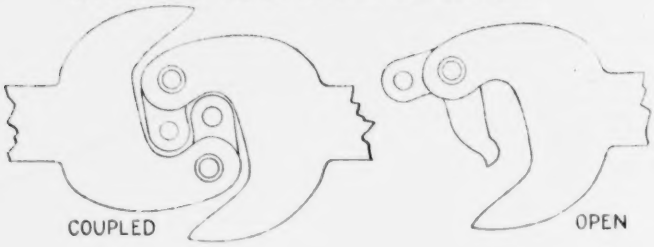
after the journey has actually begun. I accordingly dissent from the conclusion of the majority of the court on this point.

If "it would be no violation of the statute for a carrier to haul an empty car not used to move interstate traffic from one end of its railroad to the other" it would follow that a dining car in the course of a trip from Ogden to San Francisco which happened to be empty—for dining cars are not in constant use by the traveling public—would not be subject to the control of Congress. It is submitted that the car in question was regularly engaged in interstate commerce; that no intention was manifested to take it out of that service; that, on the contrary, it was stopped at Promontory for the purpose of being returned to San Francisco, and there was, therefore, evidenced an intention to retain it in that service. The construction placed upon the act by the circuit court of appeals would lead to varying and conflicting State and Federal authority over cars used in interstate commerce which might be stopped temporarily while being detached from or attached to an interstate train.

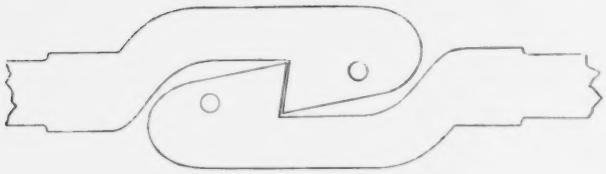
For the reasons stated it is submitted that the case is one of sufficient importance to the Government and the public to justify review by this court. In the event that the court shall grant a writ of certiorari, I would request leave to be heard at the hearing of the merits upon the questions above referred to.

HENRY M. HOYT,
Solicitor-General.

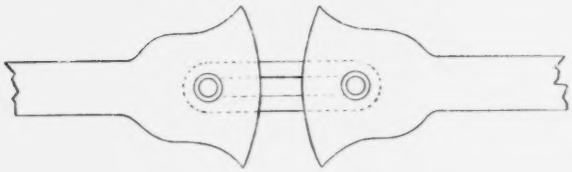
JANNEY COUPLER
OR THAT ADOPTED BY MASTER CAR BUILDERS.



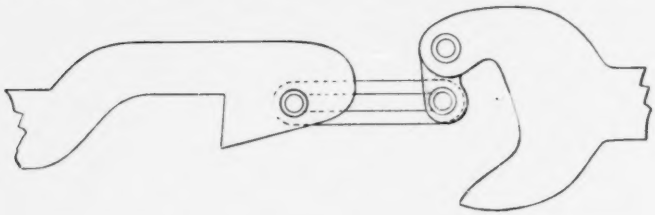
MILLER HOOK COUPLER.



LINK AND PIN COUPLER.



MILLER HOOK COUPLED TO JANNEY COUPLER BY LINK AND PIN.



In the Supreme Court of the United States.

OCTOBER TERM, 1902.

W. O. JOHNSON, PETITIONER,
v.
THE SOUTHERN PACIFIC COMPANY. } No. ——.

SUPPLEMENTAL STATEMENT IN SUPPORT OF PETITION.

The most dangerous service in the operation of railways has been and is that which involves coupling and uncoupling cars, the casualties in this one branch of railway employment exceeding tens of thousands annually. To reduce the liability to loss of life and limb in this necessarily hazardous occupation, and having special reference to the work of railway car coupling, an act was passed by Congress and approved March 2, 1893, the object of which, as indicated by its title, is "to promote the safety of employees and travelers upon railroads." As officially reported, the old link and pin coupler, in the use of which the men were required to go between the ends of the cars to couple them at the time of impact, and also for the purpose of uncoupling, caused the greatest number of injuries and fatalities to the employees.

Congress therefore provided in the statute, among other things, *that the men should not be required to go between the cars in the act of coupling, by making it unlawful to* **"haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact."**

It will be seen that Congress has not restricted the carriers as to the style, kind, make, or type of the device which should be adopted by them in conformity with this requirement of the statute. The means they must employ to avoid doing that which was thus inhibited was left entirely with the carriers themselves. They were at liberty to discard all improved coupling devices then in use and equip their cars with a new and radically different invention, or even to build and use cars of such design that the processes of coupling and uncoupling would be completely changed. *The law simply prescribed conditions of operation* and interfered in no sense with the means by which such operation should be carried on.

It is to be remembered also that the operation of the act is not confined to the cars owned by the carrier, but extends to all cars used by that carrier, whether part of its own equipment or that of any other line. The absolute necessity for through freight-car service and the extensive development of that service, involving the use frequently of Eastern railroad cars on Western roads and of Northern railroad cars in Southern territory, and *vice versa*, amounting to free interchange between practically all lines, and the

keeping of records of car movements by car-service associations, was generally well known throughout the country and by Congress. So the peculiar words "to haul or permit to be hauled or used on its line any car used in interstate traffic" were employed in framing the second section of the statute. The Southern Pacific may, for anything in the law to the contrary, have cars equipped with one type of coupler, and the cars of the Pennsylvania system, for instance, may be equipped with couplers of still another and entirely distinct type which will not couple automatically with the Southern Pacific cars, and neither company will violate the statute, until one of them, the Southern Pacific, for instance, attempts to move in interstate commerce such differently equipped car of the Pennsylvania in connection with one of its own cars. The prohibition of the statute applies only when, in the use of equipment on its line, by whomsoever such equipment may be owned, a carrier hauls or permits to be hauled or *used* over its road a car used in interstate commerce which does not couple automatically by impact with the vehicle to which it may be attached. The purpose of the law is plain, namely, that train men or other railway employees shall not be subjected to the risk, amounting almost to certainty in the course of frequent operations, of being maimed or losing their lives, involved in going between cars to couple them together by hand. It is therefore of the utmost public importance that no narrow or restricted interpretation should be placed upon the meaning of this great remedial law, and, in view of the rulings made by the court below, that the

law should in this respect be definitely construed by this court.

The interest of the public lies in seeing that a law which it took years of legislative effort to perfect, and for the execution and enforcement of which Congress appropriates large sums of money annually, and which in its operation has admittedly been of the greatest efficacy in the saving of human life and limb, shall not be nullified in respect of a most important, if not its most important, provision by reason of a decision in which those especially charged by law with the execution of this remedial statute have had no opportunity to be heard.

It is matter of common knowledge that there are hundreds of different kinds or makes of automatic coupler. There are, however, but three types: (1) The old link and pin, which was practically in universal use, but condemned by the carriers themselves prior to the passage of the act; (2) the Miller hook, which at the time of the accident upon which this case is founded was fast disappearing from use; (3) the Janney, or Master Car Builders' type of coupler, with which the cars of all railroads of this country were almost entirely equipped at that time, and are now completely equipped, except in isolated instances.

To work out the problem presented to them by the act and to bring about the necessary uniformity in coupling operations, the railroad companies were granted five years by the statute and two and a half years' additional time through successive extension

orders issued by the Interstate Commerce Commission. The final extension expired August 1, 1900, and it was after that date that the Southern Pacific Company was using a car equipped with a Miller hook, which would not couple with the coupler in general use, and which was used upon all its own freight cars.

Johnson was a freight (not a passenger) brakeman, and as few, if any, freight cars were at that time, or had ever been, equipped with Miller couplers, he was not required, in the ordinary course of his employment, to couple Miller couplers. The locomotive, as shown by the assignments of error, was not a passenger locomotive. It was a freight locomotive, equipped with the Janney coupler, the type of coupler in universal use in freight service, and the attempt to couple the freight engine to the dining car, a car used in passenger service, was altogether unusual. Johnson was therefore required to do something outside of the scope of his usual duties, and, in any event, *was required to do the very act which Congress has prohibited*, and which public opinion and expert railway opinion has unanimously condemned, namely, go between the cars.

The circuit court of appeals utterly missed the intention of the statute when it says "There is nothing in it which requires a common carrier engaged in interstate commerce to have every car on its railroad equipped with the same kind of coupling, or which requires it to have every car equipped with a coupler which will couple automatically with every other coupler with

which it may be brought into contact in the usual course of business upon a great transcontinental system of railroads."

The automatic couplers were always an illusive remedy when different makes came together. Statistics of casualties and the personal experience of all who have anything to do with coupling prove that it is immeasurably less dangerous to couple entirely by the old method of the "deadly" link and pin than to use the link and pin, as is necessary, when two automatic couplers of different designs, such as the Janney and Miller, are brought together. So that if the law means that its purpose of reducing to a minimum the risk to limb and life should be carried out, it necessarily intends, not that its terms are satisfied if a company adopted any device which was automatic with its counterpart, but that the device must couple automatically by impact as the statute requires, which necessarily makes it interchangeable with other devices. The common use of equipment on a mileage basis throughout the country, the use on every railroad of cars of other roads equipped with different devices, the meetings and interchanges in interstate commerce, the time given for adjustment, all point to the view that mutual and interchangeable working of couplers was always contemplated by the law, and nothing else will satisfy the requirements of the statute.

As has been stated by the Interstate Commerce Commission in their reports to Congress, so-called automatic couplers can only be considered automatic

within the meaning of the act during such time only as all their parts are in workable order and "automatically couple by impact."

W. L. MAGINNIS,
Counsel for Petitioner.
L. A. SHAVER.

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BRIEF FOR PETITIONER.

In the Supreme Court of the United States

OCTOBER TERM, 1904.

Office Supreme Court U. S.
FILED
OCT 17 1904
JAMES H. McKENNEY,
Clerk.

W. O. JOHNSON, *Petitioner.*

vs.

SOUTHERN PACIFIC COMPANY, *Respondent.*

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

W. L. MAGINNIS,
Attorney for Petitioner.

In the Supreme Court of the United States

OCTOBER TERM, 1904.

W. O. JOHNSON, *Petitioner*,

vs.

SOUTHERN PACIFIC COMPANY, *Respondent.*

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

BRIEF FOR PETITIONER.

STATEMENT OF THE CASE.

Petitioner adopts the statement of the facts in this case as made by the Circuit Judge, deciding the case in the Circuit Court of Appeals except for one clause which he has deemed it necessary to insert, which will be noticed as set in capitals.

This is an action for damages for a personal injury in which the Court instructed the jury to return a verdict for the defendant upon this state of facts: The defendant was operating passenger trains between San Francisco, in the state of California, and Ogden, in the state of Utah. It was in the habit of drawing a dining car in these trains. Such a car formed a part of the train leaving San Francisco, and ran through to Ogden, where it was ordinarily turned and put into a train going west to San Francisco. On August 5, 1900, the eastbound train was

so late that was not practicable to get the dining car into Ogden in time to place it in the next westbound train, and it was therefore left on a side track at Promontory, in the state of Utah, to be picked up by the westbound train when it arrived. While it was standing on this track the conductor of a freight train which arrived there was directed to take this dining car to a turn-table, turn it, and place it back upon the side track, so that it would be ready to return to San Francisco. The conductor instructed his crew to carry out this direction. The plaintiff, Johnson, was the head brakeman and he undertook to couple the engine to the dining car for the purpose of carrying out the order of the conductor. THE TRAIN ON WHICH JOHNSON WAS CAME TO THE STATION FROM THE WEST; THE ENGINE WAS UNCOUPLED, RAN AHEAD TO THE SWITCH, AND WAS LET IN ON THE CUT-OFF TO THE DINING CAR. (Tr. p. 14.) IT WAS UNDERSTOOD BY THE COURT AND JURY THAT JOHNSON WAS ATTEMPTING TO COUPLE THE TENDER OF THE ENGINE TO THE DINING CAR. THE TENDER BEING AT THE BACK OF THE ENGINE WHEN THE ENGINE WAS IN BACKWARD MOTION, IT WAS GOING TOWARD THE TENDER. THERE IS NO DIRECT TESTIMONY THAT JOHNSON WAS TRYING TO COUPLE THE TENDER, BUT ALL THE TESTIMONY POINTS TO THAT FACT. "I FAILED TO MAKE IT THE FIRST TIME, I GAVE THE ENGINEER THE SIGNAL TO SLACK AHEAD AND COME BACK THE SECOND TIME AND I FAILED AGAIN. (Tr. p. 14.) I TOLD HIM EACH TIME TO MOVE BACK. (Tr. p. 18.) HE WAS NOT COMING BACK VERY SWIFT EITHER. (Tr. p. 19.) HE DID NOT

COME BACK UNTIL I SIGNALLED HIM TO COME. BACK. (Tr. p. 11.) Q. HE MOVED BACK AND YOU FAILED TO MAKE THE COUPLING THAT TIME? A. I NEVER MADE IT. (Tr. p. 19.) Q. AND THEN YOU MADE THE SIGNAL FOR HIM TO COME BACK THE SECOND TIME. A. AND AS SOON AS I GAVE THE SIGNAL, ETC. (Tr. p. 19.) Q. YOU THEN SIGNALLED FOR HIM TO MOVE HIS ENGINE OFF AGAIN, SO AS TO ENABLE YOU TO MAKE IT AND YOU THEN SIGNALLED HIM TO COME BACK SO YOU COULD MAKE THE CONNECTION? A. YES, SIR. (Tr. p. 20.) I PUT THE LINK IN THE MILLER HOOK AND THEN ATTEMPTED TO COUPLE ON THE ENGINE AS IT BACKED UP. (Tr. p. 20.) The freight engine was equipped with a Janney coupler, which would couple automatically with another Janney coupler, and the dining car was provided with a Miller hook or Miller coupler, which would couple automatically with another Miller hook; but the Miller hook would not couple automatically with the Janney coupler, because it was on the same side, and would not pass over it. Johnson knew this, and undertook to make the coupling by means of a link and pin. He knew that it was a difficult coupling to make and that it was necessary to go between the engine and the car to accomplish it, and that it was dangerous to do so. Nevertheless he went in between the engine and the car and tried to make the coupling three times without objection or protest. He failed twice and the third time his hand was caught and crushed so that it became necessary to amputate his arm above the wrist.

ARGUMENT.

Three points were decided in the Circuit Court of Appeals, each one of which we consider as erroneous. The first was that under the Act of Congress of March 2, 1893, and section 2 of said act, which reads as follows: "That on and after the first day of January, 1898, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its lines any CAR used in moving interstate traffic, not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars") a freight engine was not a car. Second, that the dining car, having been equipped with a Miller hook, which would couple automatically with other Miller hooks, but not with the Janney coupler which was on the engine, and the Janney coupler being automatic if brought into contact with other Janney couplers, but not automatic when brought into contact with the Miller hook, that even though these two would not couple by impact, yet the statute had been complied with. Third, that the dining car, having been set out on the side track at Promontory for the purpose of being picked up and carried on its return trip to California by the westbound train, although in the process of being turned around preparatory to its return journey, was not at that time being used in interstate traffic.

1. As to the first point decided by the court below, a singular condition of affairs seems to exist. It is only another illustration of the fact so well known to lawyers that whilst a witness is upon the stand detailing what happened, a certain state of affairs will be understood from his testimony, by

court, counsel and jury, and yet when the same testimony is reduced to cold print the fact assumed by every person in the trial does not appear, at least plainly to the reader. In this case, as will be seen by the clause interpolated in the statement of facts, the plaintiff Johnson was engaged in coupling an "engine" to a dining car, and it is very material to determine what is meant by the word "engine." We take it for granted that it is a matter of common every-day experience and observation that what the majority of people understand by the word "engine," as used in connection with a train of cars, is what technically would be called the locomotive and tender. In fact, in practical railroading there is no such thing as an "engine" without a tender, as the tender carries the coal and water, without which the locomotive could not run a mile, and never does. So that in considering what was meant in the court below when the witnesses and counsel used the word "engine," we must apply the result of common observation, which is, that reference was made not only to the locomotive, but to the tender. But the tender is only a car, nothing more nor nothing less; it is used for the transportation of coal and water to supply the locomotive. The definition of tender as given in Volume 4, Universal Dictionary of the English Language is: "The carriage which is attached to a locomotive and contains the supply of fuel and water." In this case, although it is nowhere directly said in the testimony in so many words that the Janney coupler referred to was on the back of the tender, yet a fair construction of the testimony shows that that was the part of the engine with which Johnson was dealing. At every place where it is spoken of he uses the expression that "the engine backed up"; he "gave a signal to back up";; "it came back."

When an engine moves with a locomotive in front, the only correct expression is that it moves forward, and not backward; when, on the contrary, the tender is going first, the only correct expression is that it moves backward. It seems singular that this phase of the question should have been overlooked by the learned Circuit Court of Appeals. But if we are correct in our view of it, there can be no possibility of doubt but what the tender, being a car, was within the purview of the Act of Congress.

But even admitting, for the sake of argument, that it was not, we respectfully insist that this Act of Congress is remedial in its nature, as far at least as protecting employes upon the train is concerned, by rendering it unnecessary for them to go between the cars. As was said by Judge Thayer in the court below:

> "In my judgment it is a very technical inter-
> "pretation of the provisions of the act in
> "question, and one which is neither in ac-
> "cord with its spirit nor with the obvious
> "purpose of the law-maker, to say thatCon-
> "gress did not intend to require engines to
> "be equipped with automatic couplers.
> "The statute is remedial in its nature. It
> "was passed for the protection of human
> "life, and there was certainly as much if not
> "a greater need that engines should be
> "equipped to couple automatically as that
> "ordinary cars should be so equipped, since
> "engines have occasion to make couplings
> "more frequently."

Johnson v. S. P. 54 C. C. A. 519. To the same effect see the case of Fleming v. Southern Railway Co., 131 N. C. 46; 42 S. E. 905. And, indeed, if I read correctly, the Circit of Appeals, through Judge

Vandeventer, in C., M. & St. Paul Ry. Co. v. Voelker, 129 Fed. 522, takes the same view of this statute, where he says:

> "Obviously, the purpose of this statute is the "protection of the lives and limbs of men, "and such statutes when the words fairly "permit are so construed as to prevent the "mischief and advance the remedy."

Which opinion was concurred in by the Justice who wrote the opinion in the Circuit Court of Appeals in the Johnson case.

A section of a statute may be penal as to some of its provisions, and not penal as to others. As illustrations of this see Smith v. Townsend, 148 U. S. 497; Taylor v. Gilman, 23 Blatchford, 327; Wall v. Platt, 169 Mass. 398; Stewart v. B. & O. R. R. Co., 168 U. S. 445; Sutherland on Statutory Construction, sections 208, 360; Taylor v. U. S. 3 Howard, 197.

2. The second point decided by the Circit Court of Appeals is, that the dining car, being equipped with a Miller hook, which is automatic, and the tender, being equipped with a Janney coupler, which also is automatic, but which by reason of their peculiar construction will not couple in impact, that the whole duty of the railroad company under the Act of Congress had been complied with. Judge Sanborn says, in his opinion in the court below (page 515):

> "There are several kinds or makes of practi- "cal and efficient couplers. Some of the rail- "road companies use one kind; others have "adopted other kinds. Couplers of each "kind will couple automatically with others "of the same kind or construction. The "same couplers will not couple automatic- "ally with couplers of different construc-

> "tion. Railroad companies engaged in in-
> "terstate commerce are required to haul
> "over their roads cars equipped with all
> "these couplers. They cannot relieve them-
> "selves from this obligation, or renounce
> "this public duty, for the simple reason
> "that their cars or locomotives are not
> "equipped with automatic couplers which
> "will couple with those with which the cars
> "of other roads are provided, and which will
> "couple with equal facility with those of
> "their own."

It seems to us that the reasoning of the learned justice is fallacious in the extreme, and we respectfully insist so. The Act of Congress not only requires that the cars should be equipped with automatic couplers, but adds the significant words, qualifying the general expression, "coupling automatically by impact." If we understand this language it means that the coupler must not only be of a kind known as automatic, but that in its use it must be in such condition as to couple by impact. It would be absurd, and destructive of the law, if the railroad were permitted, after having adopted a certain style of automatic couplers, to make up its trains, either in isolated instances or as a rule, by undertaking to couple together a series of cars which, by reason of being equipped with dieffrent styles of couplers, would not couple by impact, but would require its brakemen to go between the cars to make the couplings. The same principle which requires the railroad company, after once equipping its cars with automatic couplers to keep the same in repair, so that they will actually work automatically, would seem to require that at least in the same train the coupling appliances should couple by impact. Nor will it

do to say that they are obliged to accept cars from other railroads Such a proposition is neither good in law nor in fact, as it occurs every day for one reason or another that railroad companies require goods to be transferred from the cars of other railroads to its own cars before it will undertake to transport them. The adoption by the railroads company of a reasonable regulation fully protects it from the consequences of such action upon its part.

3. The third point decided by the Circuit Court of Appeals is, that the dining car in question, under the circumstances, was not engaged in interstate traffic at the time of the accident. This dining car Del Monte was used between Sacramento, California, and Ogden, Utah, upon the passenger train of the Southern Pacific Company, to feed the passengers, and it seems to have run into Ogden on one train and out on the succeeding westbound train. On the occasion in question, the eastbound train being late could not reach Ogden before the westbound train would start, and for that reason, and for that reason alone, the train dispatcher ordered it set out at Promontory, a small station in Utah west of Ogden—in fact, so small that there was no switch engine there, and no means of repairing cars even in the slightest detail, and certainly no means of replenishing the stock of eatables necessarily carried on such a trip. Whilst it was standing there, still in pursuance of the purpose of using it in what unquestionably would be interstate traffic (Pullman Co. v. Nolan, 22 Fed. 276; Pickard v. Pullman Co., 117 U. S. 34), orders were transmitted by the train dispatcher to the freight crew, of which Johnson was one, to turn this car around, so that the kitchen would be at the rear end of the car, and the odors arising from the cooking would not offend the passengers who would

use the car. Judge Sanborn, in his opinion in the court below, assumes that the car was empty. If by that he means that no person was dining in it at the time, it may be conceded; but that it was empty nowhere appears. It does not appear that the cooks and conductor, the supplies and equipment of the car, were not all in place in the car. In fact, if we are justified in forming any conclusion, it would seem improbable to say the least of it that all of the employes of the company would desert the car at Promontory and take with them the supplies with which it was intended to feed the passengers during the forty-eight hours which were required to make the trip to Sacramento. Our contention is that the car, having once been impressed with the character of being used in interstate traffic, until the completion of its journey or until some act of the railroad company occurred which would affirmatively divest it of such character, it would remain in interstate traffic. How can it be said with any sort of justict that this car had completed its journey? Certainly the station at Promontory was not a terminal, either of the trip of the dining car or of the road. The car never was out of service; it was being used, in the very act of turning it around, in one sense, for its legitimate purpose as a dining car, as much as if it were upon a train and a number of people were eating meals in it. It was a round trip it was making, and it was

No temporary stoppage of interstate traffic, without some act of abandonment, will deprive it of its interstate character. (D. & H. Co. v. Pa., 1 L. R. A. 232.) The test laid down by this court in such cases, as to the termination of the interstate character of the article in question, seems to be indefinite delay.

In the case of Kelly v. Rhoads, 188 U. S. 1, Mr. Justice Brown says:

> "Bearing in mind that the weight of all the "previous cases in this court has been laid "upon the fact of an indefinite delay, await- "ing transportation at the commencement "of the journey, or awaiting sale or delivery "at its termination, the facts in this case fail "completely to bring it within those athor- "ities."

There was no indefinite delay in this case. On the contrary, the delay was definite and for a purpose, and, as we view it, was only part of the trip. As was said by Mr. Justice Thayer, in the court below:

> "I am also of the opinion that within the fair "intent and import of the act the dining car "in question, at the time of the accident, "was being hauled or used in interstate "traffic. The reasoning by which a con- "trary conclusion is reached seems to me "to be altogether too refined and unsatis- "factory to be of any practical value. It "was a car which at the time was employed "in no other service than to furnish meals "to passengers between Ogden and San "Francisco. It had not been taken out of "that service, either for repairs or for any "other use, when the accident occurred, but "was engaged therein to the same extent "as it would have been if it had been hauled "through to Ogden and if the accident had "there occurred while it was being turned "to make the return trip to San Francisco. "The cars composing a train which is regu- "larly employed in interstate traffic ought "to be regarded as used in that traffic while "the train is being made up with a view to

"an immediate departure on an interstate "journey, as well as after the journey has "actually begun."

If this car were to be regarded as an empty car, that fact alone would not affect its interstate character. Malott v. Hood, 66 N. E. 247.

Respectfully submitted,

W. L. MAGINNISS,
Attorney for Petitioner.

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Supreme Court U. S.
FILED
OCT 18 1904
JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

W. O. JOHNSON, PETITIONER,
v.
SOUTHERN PACIFIC COMPANY. } No. 32.

W. O. JOHNSON, PLAINTIFF IN ERROR,
v.
SOUTHERN PACIFIC COMPANY. } No. 37.

BRIEF FOR PETITIONER AND PLAINTIFF IN ERROR.

W. L. MACKENZIE,
L. A. SHAVER,
JOHN M. GITTERMAN,
Of Counsel.

In the Supreme Court of the United States.

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W. O. JOHNSON, PETITIONER,
v.
SOUTHERN PACIFIC COMPANY. } No. 32.

W. O. JOHNSON, PLAINTIFF IN ERROR,
v.
SOUTHERN PACIFIC COMPANY. } No. 87.

BRIEF FOR PETITIONER AND PLAINTIFF IN ERROR.

This is an action for personal injuries, brought here by virtue of a writ of error and of certiorari from the circuit court of appeals of the eighth judicial circuit. By stipulation (pp. 47, 48) the transcript in cases 279 (old number) (certiorari) and 362 (old number) (writ of error) is to be used for both cases, except the portion thereof constituting the writ of error and other proceedings subsequent thereto.

The action was begun on October 6, 1900, in the first judicial district court of the State of Utah, in and for Box Elder County, and was removed to the United States circuit court by the defendant for diversity of citizenship, on October 30, 1900.

The action came on for trial on June 28, 1901, before Judge Marshall and a jury and without putting

the defendant to any proof, but on defendant's motion the court directed a verdict for the defendant.

An appeal was taken from the judgment entered on Judge Marshall's order to the circuit court of appeals for the eighth circuit, and on the 28th of August, 1902, an opinion was handed down in that court which affirmed the judgment in the trial court. From the judgment entered on that decision this court issued, as said above, its writ of error on June 5, and writ of certiorari on June 3, 1903

This brief is filed on behalf of the petitioner, Johnson.

STATEMENT OF THE CASE.

Statement of case.

The plaintiff in error on August 5, 1900, was acting as head brakeman on a freight train of the Southern Pacific Company. The train ran between Carlin, Nev., and Ogden, Utah, on its regular run from San Francisco, Cal. When this through freight train coming east to Ogden arrived at Promontory, Utah, the conductor ordered Johnson, the plaintiff in error, to uncouple the locomotive, go to the cut-off, fetch a dining car standing there, bring it out on the turntable, turn it around, and then couple the locomotive to the train again.

The dining car had been brought that day from San Francisco on an eastbound passenger train, and it was intended to haul it to Ogden, where it would be placed on a westbound passenger train and returned to San Francisco. On account of the eastbound train being some hours late, the train dispatcher ordered it set out

at Promontory to await the westbound train at that point, there not being time to reach Ogden before the departure of that train, and he then ordered it turned around so that the kitchen would be at the rear end, and so that the odors from the cooking would not offend the persons eating in the car. Johnson proceeded to carry out the order of the conductor, who was his superior officer. He cut the engine off, let it back on the cut-off toward the dining car, and endeavored to make the coupling as he had been ordered to do.

The couplers used.

The dining car was equipped with what is known as a "Miller hook" and the tender of the engine was equipped with what is known as a "Janney" or Master Car Builders' coupler. These two couplers would not couple together, and it was necessary, in order to make the coupling, for Johnson to use a link and pin between them. He tried to couple the tender to the dining car, but in making the coupling he was injured after the second attempt. He does not use the expression that the Janney or California coupler was on the tender, but throughout his testimony he continually expresses it that he called for the engine to back up. On page 14 of the transcript he says: "I failed to make it the first time. I gave the engineer the signal to slack ahead and come back the second time, and I failed again." On page 18 he says: "I told him each time to move back." On transcript page 19: "He was not coming back very swift, either. He did not come back until I signaled him to come

back." "Q. He moved back and you failed to make the coupling that time? A. I never made it." (Tr., p. 19.) "Q. And then you made a signal for him to come back the second time? A. And as soon as I gave the signal," etc. (Tr., p. 19.) "Q. You then signaled for him to move his engine off again, so as to enable you to make it; and you then signaled him to come back, so you could make the connection? A. Yes, sir." (Tr., p. 20.) "I put the link in the Miller hook and then attempted to couple on the engine as it backed up." (Tr., p. 20.) The Miller hook and Janney coupler will not couple automatically by impact. (Tr., p. 15.) The third time his left arm was caught between the bumper on the tender and the dining car vestibule bumper, and was so crushed at the wrist that it had to be amputated.

PLEADINGS.

Pleadings.

This is an action for damages for personal injuries.

On October 6, 1900, action was brought by Johnson against the Southern Pacific Company in the first judicial court of the State of Utah, in and for Box Elder County.

The complaint charges that the defendant is a corporation organized and existing under the laws of the State of Kentucky, and at all times thereinafter mentioned, was and is engaged in operating a railroad between California and Utah, and that at all times was and is a common carrier engaged in interstate commerce by railroad, and was on the 5th day of August, 1900, *hauling and using* on its line a certain locomotive

engine, more fully described hereinafter, used in moving interstate traffic.

That Johnson was the head brakeman of a freight train used in moving interstate traffic, and that he was ordered to uncouple the engine before mentioned from said freight train and couple it to a certain dining car, also used in moving interstate traffic, which said dining car was temporarily standing in the company's yard at Promontory, Utah, waiting the arrival of a through train to be taken to San Francisco.

Complaint.

That the said engine was equipped with what is commonly known as a Janney coupler, and that the said dining car was equipped with what is commonly known as a Miller hook, which two distinct kinds of couplers were not couplers which, acting together, would couple automatically by impact, and therefore had to be coupled by hand by a person passing between the ends of said car and engine and uniting the same by means of a link and pin.

That it was the duty of said defendant company to furnish its cars and locomotives with coupling appliances automatic in their character and which would and should couple automatically by impact, and not necessitating the brakeman of said company going between the cars to couple the same, all of which defendant company well knew, as also the condition of said cars in that respect, and is hereinafter set out, and said defendant company negligently and carelessly used, operated, and maintained the

Complaint.

said locomotive and car in such condition for a long period of time before said accident, by reason of which negligence and carelessness plaintiff was injured, as herein set out.

That the said defendant company ordered and directed the said plaintiff to couple the said engine to said dining car, as aforesaid, and in order to do so he was obliged to use a link and pin and pass in between the said dining car and said moving engine, which he did; and while endeavoring to couple together the said engine and dining car with such link and pin, with all due care and without any fault or negligence on his part, his left arm and hand was (*sic*) caught between the said couplers and ends of said dining car and moving engine, thereby bruising and crushing the same and rendering it useless and diseased, and necessitating the amputation of said hand and forearm.

Plaintiff alleges that he was earning $90 a month, was healthy, strong, and able-bodied before the accident which resulted in the loss of his left arm. In his complaint he claimed $20,000 damages.

The defendant removed the action on October 30, 1900, to the circuit court of the United States for the district of Utah, and, on December 11 filed its answer. The material parts of the answer appear below.

Answer.

Defendant admits the first subdivision of plaintiff's complaint, but denies that at the time of the alleged injuries to plaintiff on said 5th day of August, A. D. 1900, said locomotive engine was being used in moving interstate traffic.

Defendant admits that on the 5th day of

August, 1900, plaintiff was acting as head brakeman upon a freight train composed of freight cars and a locomotive engine of said company, which, at and prior to its arrival at said Promontory, was being used in moving interstate commerce, and that on arriving at Promontory plaintiff was ordered and directed to uncouple the said engine from said train, which he did accordingly, and subject to the rules and regulations of defendant was directed to couple the said engine onto a certain dining car, which was standing at the time in the yard of said company in said town of Promontory; but this defendant *denies* that on said 5th day of August, or at the time of the alleged injuries to plaintiff, said dining car was being used in *moving interstate traffic.*

Defendant admits the third subdivision of said complaint.

Defendant denies that, as applied to said engine after it was parted from said freight train and said dining car standing in the yards of defendant at Promontory, and at the time said alleged coupling was attempted, it was the duty of said defendant at or prior to said attempted coupling to furnish said dining car with a coupling appliance, automatic in its character, or which should couple automatically by impact, not necessitating the brakeman going between the cars to couple the same; or that defendant well knew the same, or knew that said dining car had not a reasonably safe and satisfactory coupler upon the end thereof that was to be coupled, or that defendant negligently and

Answer.

carelessly used or operated said dining car then standing in the yards of said company, or that by reason thereof said plaintiff was injured as alleged in said complaint.

Defendant admits that in ignorance of the condition of said dining car it ordered or directed said plaintiff to couple said engine to said dining car, but that plaintiff well knew that it was his duty, nevertheless, to examine the couplings upon the engine and the dining car, and if the same were defective not to obey such order, but report the same to the conductor or yard master.

Defendant denies that when plaintiff was ordered to couple said cars, the couplings of which were defective, it was his duty, or he was obliged to make such couplings, or to use a link or pin, or pass in between the said dining car and said moving engine, or that while endeavoring to couple together said engine and dining car with link or pin, or with due care, or without any fault or negligence on his part, his left arm or hand was caught between the said couplers or ends of said dining car or moving engine, thereby, or by reason thereof, bruising or crushing the same, or rendering it useless or diseased, or necessitating the amputation of said hand or forearm.

Defendant denies that at the time of said alleged attempt at coupling it knew, or with reasonable diligence or care it could have known, of said Miller hook, or that said Miller hook was out of repair; and this defendant alleges that it could only know of such defects

or want of repair through its employees who did the coupling, and it was their duty, as it was the duty of plaintiff, in case of any such defects as alleged, not to make the coupling, but to report such defects to the defendant.

Defendant denies that plaintiff did not know nor had any means of obtaining knowledge that said couplings were out of order. On the contrary, defendant alleges that before attempting to make such coupling it was the plaintiff's duty to examine said couplings to see if they were in good order, to take sufficient time to do so, and in case they were defective to run no risk, but report such defects to defendant.

As to whether or not, at the time of said injury to plaintiff, he was a strong, healthy, or able-bodied man, defendant has no knowledge of or information thereof sufficient to form a belief, and therefore denies the same.

Defendant denies that by reason of any negligence or want of due care on the part of defendant, as alleged in said complaint, or by reason of plaintiff's injuries as described in said complaint, plaintiff was in the hospital two months, or lost the use of his said hand or forearm, or suffered great bodily or mental suffering or expense, or with a likelihood of further expense or suffering by having to undergo another amputation of the arm on account of its shattered condition.

Defendant denies that by the said alleged wrongful act or acts of defendant the said plaintiff is rendered a cripple for life, or is unable to perform manual labor, or has suffered damage

Answer.

thereby in the sum of $20,000, or in any sum whatever.

And for a further and separate answer to said complaint defendant alleges that prior to the said 5th day of August, 1900, said plaintiff had been in the employ of defendant for about six years, about two years as engine wiper, about two years as fireman, and about two years as brakeman upon its said road. That in all these positions, especially in the two last named, the printed rules and regulations of defendant, in its operating department on its said road, were furnished to and received by said plaintiff, and the rules and regulations in force at the time of the alleged injury to plaintiff on August 5, 1900, had, prior to that time, been furnished to plaintiff and he knew and was familiar with said rules. That by these rules it was among other things provided, in reference to employees on defendant's said road, and as governing said plaintiff, as one of its said employees, that "Employees are required to be conversant with and obey the rules and special instructions." "If in doubt as to their meaning they must apply to the proper authority for an explanation." Also the following: "Persons employed in any service on trains are subject to the rules." Also the following: "Great care must be exercised by all persons when coupling cars. Inasmuch as the couplers of cars and engines can not *be uniform in style or strength*, and are liable to be broken from various causes so as to render it dangerous to expose the hands, arms, or persons of those engaged in making couplings, all employees are enjoined before coup-

ling cars or engines to examine and to know the kind and condition of the drawhead, draw-bar, link-and-coupling apparatus, and are forbidden to place in trains any car with a defective coupling until they shall have reported the defect to the conductor or yard-master. Sufficient time may be taken by employees in all cases to make the examination required." Answer.

That, furthermore, in obedience to these printed rules, it had become plaintiff's duty not to make the coupling; to report the defects of the dining-car coupler to the conductor or the yard master, and that plaintiff, in not reporting the defects of the Miller hook on the dining car, contributed to his own injury.

And, finally, for a third and separate defense, that Johnson knew of the printed rules, and defects in the Miller coupler on the dining car, and that he willfully and carelessly assumed the risk of attempting to make such coupling, and that thereby, without any negligence or carelessness of the defendant, he suffered the injuries complained of.

The case came on for trial on these pleadings, and after the plaintiff's testimony had been heard the defendant moved the court to instruct the jury to return a verdict in its favor, for the reason that the plaintiff had failed to make out a case upon its own evidence. The court directed a verdict in favor of defendant. On error to the circuit court of appeals for the eighth circuit, an opinion was handed down on August 28, 1902, sustaining the nonsuit of the court below. (See record, pages 35–46.) It is to reverse these judgments that this case is brought here.

ISSUES OF LAW.

Issues of law.

The questions of law growing out of the foregoing statement of facts considered in this brief are:

1. The court erred in holding that the word "car" as used in said act does not include a tender to a locomotive.

2. The court erred in holding that the Federal safety-appliance act of March 2, 1893, was satisfied when a car, having one type of coupler was used with a vehicle having another type of coupler, though thereby such couplers of different types, when brought together, would not couple automatically by impact, thus rendering it necessary for a brakeman to go between the cars, and in not holding that Johnson did not assume the risks occasioned thereby.

3. The court erred in holding that the dining car was not, at the time of the injury, used in interstate commerce.

4. The court erred in not holding that there were questions of fact proper to be submitted to the jury independent of the applicability of the act of Congress of 1893.

ARGUMENT.

THE COURT ERRED IN ITS FIRST PROPOSITION THAT THE TENDER OF AN ENGINE IS NOT A CAR WITHIN THE ACT.

Couplings.

It was known to the Congress that the greatest number of times when the couplers were to be actively used and come into play would be when the cars were to be moved about by the engine in making up trains and switched about through the yards

or at junction points, and that then the couplers must couple *automatically by impact*, and be uncoupled *without the necessity of men going between the ends of the cars.* It is not too much to say, and an every-day knowledge of every person who has ever heard anything of railroad cars, is sufficient to convince one of this, that locomotive engines enter into the matter of shifting cars about and bring about a coupling of car with car to such an extent that the word car must certainly be assumed to cover a locomotive unless the contrary is expressed, or at least that the tender of an engine is included in the phrase "any car," as was held by Judge Thayer in his dissenting opinion. Couplings.

The opinion of the court below, however, wastes away by the refinements of criticism the safety-appliance act by holding that a locomotive or its tender is not a car for the purpose required by that act, and thus sustains the decision of the court at trial term. In the opinion of the circuit court of appeals it is stated "but the interpolation in this act of Congress, by construction of an ex post facto provision, that it is and ever since January 1, 1898, has been unlawful for any common carrier to use any engine in inter-state traffic that is or was not equipped with couplers coupling automatically, and that any carrier that has used or shall use an engine not so equipped has been and shall be liable to a penalty of $100 for every violation of this provision, is too abhorrent to the sense of justice and fairness, too rank and radical

a piece of judicial legislation, and in violation of too many established and salutary rules of construction to commend itself to the judicial reason and conscience. The primary rule for the interpretation of a statute or a contract is to ascertain, if possible, and enforce, the intention which the legislative bodies which enacted the law or the parties that made the agreement have expressed therein."

Although this act of Congress was approved on March 2, 1893, it did not go into effect at once, but only after five years. By its provisions the Interstate Commerce Commission was authorized, from time to time, after full hearing and for good cause, to extend the period within which any common carrier shall comply with the provisions of the act. Under this clause the railroads obtained two extensions of time, amounting in the aggregate to two years and seven months, altogether seven years and seven months after the passage of the act.

Extensions of time to comply with act.

The safety-appliance act is clearly a remedial one. It prescribes when its provisions shall become effective. Nothing ex post facto can be construed into an act that could not become operative until 1898, and which, as a matter of fact, did not go into effect until August 1, 1900, four days before Johnson was injured, but seven years and seven months after its enactment on March 2, 1893.

Safety-appliance act is remedial.

The United States has no common law, though it has a peace and to some extent a general law appli-

cable, and flowing from those general powers of government granted to the United States. Thus the regulation of Admiralty and Maritime jurisdiction, the punishment of crimes against the revenue, or against the law of nations, all carry with them powers that any government needs to carry out those powers. So in the regulation of commerce, Congress has plenary powers. The defects which had become intolerable, the killing of thousands as an incident of handling inland traffic had to be stopped, and Congress to remedy this passed a statute declaring the public policy of the nation and stated the conditions of coupling in general language so that no excuse for any miscarriage of justice might arise. The objections made by the circuit court of appeals were to the words of the statute, and Congress passed the very words objected to by the circuit court of appeals so as not to render any one form of coupler mandatory; so as not to call into existence a huge monopoly. The general words were used so as to have every class of coupler comply with that section of the act so long as they were in good order when called upon to join car to car, or car to locomotive, namely, to couple automatically by impact.

Purpose of act.

The remedial aspect of this statute—and it is in the highest degree a remedial statute—can not be stated better than in the familiar citation from Heydon's Case (3 Coke, 7):

> "Again, in construing an act of Parliament it is a settled rule of construction that cases out of

Rules for the interpretation of statutes.

the letter of the statute, yet within the same mischief or cause of the making, thereafter shall be within the remedy thereby provided; and accordingly it is laid down that for the sure and true interpretation of all statutes (be they penal or beneficial, restrictive or enlarging of the common laws) four things must be considered:

(1) What was the common law before the making of the act? (2) What was the mischief for which the common [in this case Federal] law did not provide? (3) What remedy has been appointed by the legislature for such mischief? and (4) The true reason for the remedy. And then the duty of the judges is to put such a construction upon the statutes as shall suppress the mischief and advance the remedy to suppress the subtle inventions and evasions for continuing the mischief *pro privato commodo*, and to add force and life to the cure and remedy according to the true intent of the makers of the act, *pro bono publico*. In expounding remedial laws, then, the courts will extend the remedy so far as the words will admit.

In Potter's Dwarris on Statutes and Constitutions, page 234, the principle is laid down that—

> A statute made *pro bono publico* shall be construed in such a manner that it may, as far as possible, attain the end proposed.
>
> (Pierce *vs.* Hopper, Str. 253, is referred to.)

And in the same work it is said in a note, at page 231, that—

> In construing a remedial statute which has for its end the promotion of important and bene-

ficial public objects a large construction is to be given, when it can be done without doing violence to its terms.

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And it makes no difference in the application of these rules that the statute has a penal as well as a remedial side.

"Chancery will aid remedial laws," said Lord Keeper Wright, "*though they are called penal*, not by making them more penal, but by letting them have their course." (Ch. Prac., 215; Dwarris on Statutes, 653.) Also quoted in Sedgwick on Construction of Statutory and Constitutional Law (2d ed.), page 309.

> A statute may be penal in one part and remedial in another part. But in the same act a strict construction may be put on a penal clause and a liberal construction on a remedial clause. (Dwarris on Statutes, 655.)
>
> The statute is so penned that the words might possibly admit of two constructions, and therefore it is material to consider whether it is penal or remedial, because there is a well-known difference in the rule of construction as applied to laws of the sort and of the other. Where they are remedial the interpretation is to be liberal, so as best to apply to the end; but a law may certainly be penal in one part and remedial in another, and that is the case here. There is no danger of the liberal construction of the remedial part being extended afterwards to the penal. The distinction has been too long established for any apprehension of that sort. If the clause upon which this case

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arises is remedial, which I think it is, the most extensive sense must prevail. (*Hyde* v. *Cogan*, 2 Doug., 702, at page 705.)

A few citations follow. In *Brady* v. *Daly* (175 U. S., 156), a decision by Chief Justice Shaw is quoted:

> The action is purely remedial, and has none of the characteristics of a penal prosecution. All damages for neglect or breach of duty operate to a certain extent as punishment, but the distinction is that it is prosecuted for the purpose of punishment and to deter others from offending in like manner. Here the plaintiff sets out the liability of the town to repair, and an injury to himself from a failure to perform that duty. The law gives him enhanced damages, but still they are recoverable to his own use, and in form and substance the suit calls for indemnity. (*Reed* v. *Northfield*, 13 Pick., 94, 100, 101; 146 U. S., p. 665.)

While in *Huntington* v. *Attrill* (146 U. S., 665) this court quoted with approval the opinion of Stone, J., of Maryland, as follows:

> * * * It may perhaps be enough to say that, in general, all breaches of duty that confer no rights upon an individual or person, and which the State alone can take cognizance of, are in their nature criminal, and that all such come within the rule. But laws which, while imposing a duty, at the same time confer a right upon the citizens to claim damages for its nonperformance, are not criminal. If all the laws of the latter description are held penal in the sense of criminal, that clause in the Constitution which relates to records and judgments is of compara-

tively little value. There is a large and constantly increasing number of cases that may in one sense be termed penal, but can in no sense be classed as criminal.

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And, further, on page 667:

> Penal laws, strictly and properly, are those imposing punishment for an offense committed against the State, and which, by the English and American constitutions, the executive of the State has the power to pardon Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal.
>
> The action of an owner of property against the hundred to recover damages caused by a mob was said by Justices Willes and Buller to be "penal against the hundred, but certainly remedial as to the sufferer." (*Hyde* v. *Cogan*, 2 Doug., 699, 706.)

The safety appliance act is not a penal statute in so far as it protects human life and enlarges the remedies of the employee for a disregard thereof, and yet the court below stated:

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> Moreover, this is a penal statute, and it may not be so broadened by judicial construction as to make it cover and permit the punishment of an act which is not denounced by the fair import of its terms. The acts which this statute declares to be unlawful, and for the commission of which it imposes a penalty, were lawful before its enactment, and their performance sub-

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jected to no penalty or liability. It makes that unlawful which was lawful before its passage, and it imposes a penalty for its performance. Nor is this penalty a mere forfeiture for the benefit of the party aggrieved or injured. It is a penalty prescribed by the statute and recoverable by the Government. It is, therefore, under every definition of the term a penal statute. The act which lies at the foundation of this suit—the use of a locomotive which was not equipped with a Miller hook to turn a car which was duly equipped with automatic couplers—was, therefore, unlawful or lawful as it was or was not forbidden by this statute. That act has been done. When it was done it was neither forbidden nor declared to be unlawful by the express terms of this law. There is no language in it which makes it unlawful to use in interstate commerce a locomotive engine which is not equipped with automatic couplers.

* * * The mischief at which a statute was leveled, and the fact that other acts which it does not denounce are within the mischief, and of equal atrocity with those which it forbids, do not raise the presumption that the legislative body which enacted it had the intention, which the law does not express, to prohibit the performance of the acts which it does not forbid. Nor will they warrant a construction which imports into the statute such a prohibition. The intention of the legislature and the meaning of a penal statute must be found in the language actually used, interpreted according to its fair and usual meaning, and not in the evils which it was intended to remedy, nor in the assumed

secret intention of the lawmakers to accomplish that which they did not express. Opinion of court below.

Again, further on the court says:

> The act of March 2, 1893, is a penal statute, and it changes the common law. It makes that unlawful which was innocent before its enactment, and imposes a penalty, recoverable by the Government. Its terms are plain and free from doubt and its meaning is clear. It declares that it is unlawful for a common carrier to use in interstate commerce a car which is not equipped with automatic couplers, and it omits to declare that it is illegal for a common carrier to use a locomotive that is not so equipped. As Congress expressed in this statute no intention to forbid the use of locomotives which were not provided with automatic couplers, the legal presumption is that it had no such intention, and provisions to import such an intention into the law and to effectuate it may not be lawfully enacted by judicial construction. The statute does not make it unlawful to use locomotives that are not equipped with automatic couplers in interstate commerce, and it did not modify the rule of the common law under which the plaintiff assumed the known risk of coupling such an engine to the dining car.

Now let us see how these views of the circuit court of appeals agree with those enlightened views expressed by this court in *Holy Trinity* v. *United States* (143 U. S., 457).

In that case the only question at issue was whether or not a professional man, brought over to assume the

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rectorship of a church in New York City, was included within the terms of the contract labor law. In discussing the question Mr. Justice Brewer said:

> Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy; and *for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body* (our italics). *United States* v. *Union Pacific Railroad* (91 U. S., 72, 79). The situation which called for this statute was briefly but fully stated by Mr. Justice Brown, when as district judge he decided the case of *United States* v. *Craig* (28 Fed. Rep., 795, 798): "The *motives and history of the act are matters of common knowledge* (our italics). It had become the practice for large capitalists in this country to contract with their agents abroad for the shipment of great numbers of an ignorant and servile class of foreign laborers, under contracts, by which the employer agreed, upon the one hand, to prepay their passage, while, upon the other hand, the laborers agreed to work after their arrival for a certain time at a low rate of wages. The effect of this was to break down the labor market and to reduce other laborers engaged in like occupations to the level of the assisted immigrant. The evil finally became so flagrant that an appeal was made to Congress for relief by the passage of the act in question, the design of which was to raise the standard of foreign immigrants and to discountenance the migration of those who had not sufficient means in their own hands or those of their friends to pay their passage.

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The court held that, although literally within the terms of the act, common sense would not permit the court to construe said act as applying to the learned professions. So in this case we insist that common sense requires, in view of "contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body," that a locomotive or tender, or any other vehicle, should be considered a car. Every evil which this act was designed to correct was provided for, and, as the title states, the act was to promote safety, etc.

The contract-labor act was much more penal in its character and purposes than the safety-appliance act of March 2, 1893, which had a far more humane and commendable scope, viz., the protection of that class of wage earners who are not allowed to leave their occupation at will, owing to the quasi public character of their work. If in the Holy Trinity case a member of a learned profession, yet an alien, was admitted to this country under that statute, how much more will this court be disposed to favor the validity of a clearly worded enactment, meant to protect the lives and limbs of the youth and manhood of our own country, engaged in the movement of internal commerce by railway.

It was, as stated, to protect a large and important class of the community whose only protection could come from the Congress of the United States, because that body alone could enforce *uniformity* on every system and in every case. No State law could be passed which would protect the brakemen, because their work on every railroad is largely that of handling interstate

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traffic, although it may be done within the body of a State. Over this traffiic the particular States have no control, and should the States undertake to legislate on lines different from those of the National Government, it would make conditions much worse than before. As the court said in the Trinity Case, "A statute must not be construed to be absurd." Again, it must be remembered that the safety appliance act makes it unlawful for "any such common carrier to haul or permit to be hauled or *used on its line* any car used in moving interstate traffic not equipped with couplers coupling automatically by impact."

Every word of an act must be used to aid in giving effect and here it is forbidden (a) to haul, (b) to permit to be hauled, and (c) or to be used on its line, all carefully stated general conditions of service for the relief and aid of trainmen engaged in interstate commerce. The primal object of the act is to save life and limb. The principal method is that it forbids any person to go between the ends of the cars either in coupling or uncoupling cars. That is the gist of the act, and that is *not a penal object* or intended to bring about the punishment or restrict the operation of commerce, but, on the contrary, to extend the operation and to save the lives and limbs of the men in doing it. This court, which investigated so carefully the acts of the colonies and the debates of the Congress and the committee's report to aid it in arriving at a decision whereby a professional man, yet an alien, was admitted to the United States, will certainly sedulously investigate the draft and committee reports and debates which

culminated in the safety-appliance act of March 2, 1893, for the relief of railroad men, and will find in them no scintilla of evidence to support the contention that this act aimed to either increase the revenue or punish the railroad companies for violating the act, as it intended to create and call into being general conditions of service saving the lives and limbs of railroad employees and promoting the safety of the traveling public.

Automatic couplers.

As the coupling of the tenders of locomotives to cars is far more frequent than that of freight cars amongst themselves, it follows that the legislature intended that all couplings should be made without the requirement of men going between the cars. It was unnecessary, however, for them to have stated "the tenders of locomotives," etc., for the reason that when the car engaged in interstate commerce was attempted to be coupled to any other vehicle, locomotive, or anything else, unless that vehicle had a coupler that would couple automatically with the coupler on the car, it rendered the coupler on the interstate car inoperative and therefore not in compliance with the statute because it would not couple automatically by impact. So, too, a car used exclusively in State commerce could not be used unless it had a coupler upon it which would couple with a car used in interstate commerce, because it rendered the interstate-commerce coupler inoperative and therefore not in compliance with the law. So we have this decision of the Trinity Church case as a guide for the interpretation of this great remedial statute, and it points conclusively away from any such

narrow interpretation as that indulged in by the circuit court of appeals.

Voelker case.

Indeed, the circuit court of appeals, in the eighth circuit, which decided this case, seems to have later determined that this particular statute in question is a remedial and not a penal statute, as is shown in the case of *C., M. & St. P. Ry. Co.* v. *Voelker*, decided March 26, 1904 (129 Federal, 522), in which the following language is used:

> Obviously, the purpose of this statute is the protection of the lives and limbs of men, and such statutes, when the words fairly permit, are so construed as to prevent the mischief and advance the remedy. The mischief to be prevented rested quite as much in the act of coupling as in the act of uncoupling. Science had offered, and practical use had approved, a remedy applicable not alone to the act of uncoupling, but also to that of coupling. The two statutes, Federal and State, seem to have been enacted in pursuance of a common purpose to afford a remedy as broad as the mischief and to remove the source or cause of the latter through the compulsory adoption and use of a new system of coupling and uncoupling which dispensed with the necessity of anyone going between, or at least entirely between, the cars.

In this opinion Judges Sanborn and Thayer both concurred, and it is not difficult to read in connection with the words coupling and uncoupling throughout this quotation the words "cars and engine," and the same reasoning, it seems to us, applies.

We insist, as was said by Judge Thayer, in his dissenting opinion in this case in the court below, that— Thayer, C. J., dissenting.

> In my judgment it is a very technical interpretation of the provisions of the act in question, and one which is neither in accord with its spirit nor with the obvious purpose of the lawmaker, to say that Congress did not intend to require engines to be equipped with automatic couplers. The statute is remedial in its nature; it was passed for the protection of human life, and there was certainly as much, if not greater, need that engines should be equipped to couple automatically, as that ordinary cars should be so equipped, since engines have occasion to make couplings more frequently. In my opinion, the true view is that engines are included by the words "any car" as used in the second section of the act. The word "car" is generic, and may well be held to comprehend a locomotive or any other similar vehicle which moves on wheels; and especially should it be so held in a case like the one now in hand, where no satisfactory reason has been assigned or can be given, which would probably have influenced Congress to permit locomotives to be used without automatic coupling appliances. See also *Fleming* v. *Southern Railroad* (131 N. C., 476).

JOHNSON WAS DEALING WITH A TENDER, WHICH IS A CAR.

As shown on pages 4, 5, and 6 of petitioner's other brief, the Janney coupler with which Johnson was trying to make a coupling was on the rear end of the tender, and we insist that the tender is a car within meaning of the act of Congress.

Winkler case. As was said by Mr. Chancellor Boyce, of the supreme court of Delaware, in his opinion in the case of *Philadelphia and Reading Railway Company* v. *George E. Winkler*, reported in 4 Pennewell Delaware Reports, page 387:

> Applying to this case the principle thus announced, we are of the opinion that the court below correctly charged that "Should you find that the tender at the time of the accident was equipped with automatic couplers, but that it was so connected with the bull-nose coupler that the coupling with other cars was not made automatically by impact, but so equipped that it made it necessary for men to go between the ends of the cars to couple and uncouple, then such coupling did not comply with the act of Congress and was unlawful."

Larrabee case. Reliance will probably be placed for support of the proposition that a tender is not a car within the meaning of this act upon the case of *Larrabee* v. *New York, New Haven and Hartford R. R. Co.* (66 N. E. Rep., 1032; 182 Mass., 348), in which Mr. Justice Holmes says:

> The court is of the opinion that the ruling requested should have been given. *It may be, as some of us think, that the rear end of the tender is within the policy and object of the act*, but the word "car" in its ordinary use and acceptance does not include it. On the contrary, it excludes the tender as obviously as it does the engine. It always is dangerous to give unusual meanings to the words of a document on the strength of an imagination of what

> the writer had in mind. Moreover, the other language of the section indicates that, whatever the evil which the legislature sought to prevent, it had in mind only cars properly so called. The prohibition "no railroad corporation shall haul" hardly would be so expressed if it had in conscious view not merely the cars which are regarded as the inert objects of traction by a separate engine from which they are detached daily, but also the tenders which are so much more closely associated with the source of power as almost to be regarded as one with it, and which only exceptionally and with more or less difficulty are taken apart from it.

Larrabee case.

In regard to this decision we respectfully suggest to the court that the learned justice had in mind, in rendering such decision, the words of the statute "haul or permit to be hauled," and that the further words "or used on its line" escaped his attention. In order to give each word of this section a meaning it is difficult to conceive what meaning the word "used" has in this connection; that is, the coupling of cars which includes necessarily the idea of cars being moved, unless it was meant to cover just such evasions or attempted evasions of the policy and objects of the act, as the exclusion of the tender from the words "any car," would permit. For instance, if a railroad company were to find itself encumbered with cars which were not properly equipped, if such a strict construction were to be adopted as to the words "haul or permit to be hauled," it might cause its locomotive to be attached at the rear end of the train and push the

Larrabee case.

same, and could then insist that it was not hauling or permitting to be hauled any cars. Unless this word "used" is meant to cover just exactly such cases, we do not see what force or meaning it has in the section, and, if it is meant to cover such cases, then, of course, the reasoning of the learned justice fails.

We also respectfully suggest that the learned Justice has given an entirely too restricted meaning to the word "haul" as used in said section. If we follow his reasoning correctly he lays down the premise that the tender is not being hauled and that, therefore, it is not one of the cars referred to in the section. We respectfully submit that the definition as given by the dictionary of the word "haul" is "To transport by pulling or drawing, as cars" and "To pull or draw with force." It is evident that the tender does no hauling and is furnished with no force with which to do hauling, but, on the contrary, is hauled itself, but, being a car, what possible difference can it make whether it is continually used in connection with a locomotive or should be treated as any other car and might occasionly be set out on the side track by itself?

As indicative of the interpretation put upon the law by the railroads themselves, when they petitioned the Interstate Commerce Commission for additional time within which to meet the requirements of the law, they included among other equipment their locomotives as requiring automatic couplers and did actually in fact equip their tenders.

All the various authorities, such as technical and common dictionaries, in defining the word "tender"

state it to be a *car* which carries coal and water, or fuel and water, for the locomotive. Webster defines a tender as "A *car* attached to locomotives to supply them with fuel and water while making a trip." The statute says "*any* car" and does not except such cars as are attached to the locomotive, although Congress could have said so, consequently in order to give effect to every word of the statute the intention of Congress must have been to include in the term "any car" such car as is attached to a locomotive, although not a part thereof. A tender is a car.

This is general scientific usage, as the specifications for locomotives in great international expositions, at shops, in catalogues, in scientific publications, all speak of locomotives as complete entities by number of driving wheels, and add as a separate item the height and weight of tenders. They show as distinctly as does popular usage that the tender is not a locomotive, but is a car attached to a locomotive. But as it is a separate and separable thing and as it is not a locomotive it must be a part of the category "any car." The tender is no part of the locomotive. (See cuts in Webster, 1903, Knight's New American Mechanical Dictionary, Encyclopeda Americana, Spohn's Dictionary of Engineering, and American Educational Chart No. 2 of Railway and Locomotive Engineering, 174 Broadway, New York.)

It is held by the Interstate Commerce Commission that a tender is a car when estimating the 50 per cent of air-braked cars which the second section of the

A tender is a car.

amended safety-appliance act requires in a train, and, in meeting the requirements of the law in regard to such 50 per cent, it is understood the railroads regard a tender as a car. For instance, if there were 20 cars in a train it would be sufficient if 9 cars and the tender were equipped to comply with the law.

What would the court say about the practice of those Western railroads, which, in crossing the Great Desert, find it necessary to employ two, and sometimes three, water cars in addition to the ordinary tender? Under such circumstances, would this or any court say that the additional tenders used would not be cars, and fall within the provisions of the safety-appliance act?

The circumstance that so simple a question as this can call forth a discussion seems to make it reasonable to assume that the question is material, and should the court decide that this question is a question of fact, it required submission to the jury.

Admission that tender is car.

The defendant's theory of its case was that the tender was a car—no doubt of that, if the eighth page of the record is read, where the answer of the Southern Pacific Company states:

> Defendant denies that when plaintiff was ordered to couple *said cars*, the coupling of which *were* defective, it was his duty, etc.

This is an unequivocal admission that the tender is a car for the purposes of this case, and for that the pleadings are alone to be considered. A discussion, therefore, of this question can lead to no fruitful result,

since in the Larrabee case the issue was whether or not the tender with a link and pin coupler was a car, whereas in this case the defendant company has admitted that very point by its answer. Admission of defendant.

Since on defendant's motion the case was kept from the jury it can not take advantage of the astute injection of a defense first raised on its behalf in the opinion of the circuit court of appeals. That is not the method prescribed by law to set up defenses and to raise issues. As far as this case is concerned, the defendant company elected to stand and try its case on the theory that the tender of the locomotive was a car, otherwise its pleading is meaningless and absurd.

If *either* the engine or the dining car *was used* in interstate commerce the railroad company assumed the risk of the coupling after August 1, 1900. After that date the risk was the road's, not Johnson's.

Who controls the operation of coupling when a car equipped as directed by a State is being coupled with a car equipped in conformity with the Federal law, when such couplers are of different types? We contend that it is immaterial whether the act of Congress applies to engines or not. The attempt to couple the dining car, which was engaged in interstate traffic, to anything to which it would not couple by reason of being equipped with couplers which would not couple automatically by impact was the *causa causans* of the injury.

Baugh case.

If either one of the vehicles was so equipped that the two would not work together without the necessity of men going between the cars, it necessarily follows that neither of the equipments would couple automatically by impact, as required by the statute. Bearing in mind that the law takes no account of the style of coupler used, but only aims at creating a condition which will prevent the necessity of men going between the cars, the violation of that law grows out of the attempt to couple a car used in interstate commerce with a tender (for the convenience of the railroad) when neither one is equipped for that service. The responsibility for such violation can not be escaped upon the theory that the tender was not required to be so equipped. That might be important if it was a question of coupling two tenders together, but unless the law is made to read "coupling automatically *with other cars used in interstate traffic*" it can have no force here. As was said by Mr. Justice Brewer in *B. & O. R. R.* v. *Baugh* (149 U. S., 378):

> As it passes from State to State, must the rights, obligations, and duties subsisting between it and its employees change at every State line? If to a train running from Baltimore to Chicago it should, within the State of Ohio, attach a car for a distance only within that State, ought the law controlling the relations of a brakeman on that car to the company to be different from that subsisting between the brakeman on the through cars and the company?

If the law had been construed by the railroad managers in the way in which the circuit court of appeals construed it, the number of those killed and injured would have been largely augmented, for the cars are hauled all over the country indiscriminately in State and interstate traffic, and if they had put an entirely different device on cars engaged in State traffic, and had used them, as they would have been used, together with cars engaged in interstate traffic, it would have made confusion worse confounded, and the number of deaths and injuries would have increased instead of diminishing.

Effect of opinion of court below.

THE COURT ERRED IN HOLDING THAT BOTH COUPLERS BEING AUTOMATIC, BUT NOT COUPLING BY IMPACT, SATISFIED THE STATUTE.

After making a statement that at common law "the plaintiff assumed the risks and dangers of the coupling which he endeavored to make, and for that reason he is estopped from recovering the damages which resulted from his undertaking," and reviewing and setting out those sections of the safety-appliance act of March 2, 1893 (27 Stat. L., chap. 196), the circuit court of appeals states its position in the following words:

> The first thought that suggests itself to the mind upon a perusal of this law, and a comparison of it with the facts of this case, is that this statute has no application here, because both the dining car and the engine were equipped as this act directs. The car was equipped with

Application of act.

> Miller couplers which would couple automatically with couplers of the same construction upon cars in the train *in which it was used to carry on interstate commerce* [italics ours], and the engine was equipped with a power driving wheel brake such as this statute prescribes.

The words which change the safety-appliance act are "*which would couple automatically with couplers of the same construction*," a provision not found in the act.

The words of the statute are:

> It shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling *automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.*

Automatically by impact.

Comparing the words of this statute with the words which the court uses the following discrepancy is seen to result: The act says they shall couple *automatically by impact*, and the statute is only obeyed when the couplers on the cars are in good condition. Whenever, therefore, by lack of inspection or some breakdown the mechanism does not work, or for any reason whatever men are required to go between the cars to couple them, then and in that case the statute is violated, and, to quote the statute (section 8), "any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provisions of this act shall not be deemed thereby to have

assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge." And there was ample reason for this, and the wording of this section was most carefully debated in the Congress.

Requirements of act.

The act does not require "automatic couplers," but calls for "*couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars.*" In other words, it makes it a necessity that the cars must have couplers that couple *automatically by impact.* The statute does not require cars to be equipped with automatic couplers. Couplers are never automatic *per se*, that is, they are automatic only in action and in relation to the other couplers with which they come in contact, and actually automatic when in the conditions of service they couple with other couplers without men being forced to go between the cars either to couple or uncouple; hence the words of the statute, "to couple automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars."

The court below uses the following language, relieving the defendant from the requirement of interchangeability of couplers:

> For the reasons which have been stated, this statute may not be lawfully extended by judicial construction beyond the fair meaning of its language. There is nothing in it which requires

a common carrier engaged in interstate commerce to have every car on its railroad equipped with the same kind of coupling, or which requires it to have every car equipped with a coupler which will couple automatically with every other coupler with which it may be brought into contact in the usual course of business upon a great transcontinental system of railroads. If the lawmakers had intended to require such an equipment it would have been easy for them to have said so; and the fact that they made no such requirement raises the legal presumption that they intended to make none. Nor is the reason for their omission to do so far to seek or difficult to perceive. There are several kinds or makes of practical and efficient automatic couplers.

Some railroad companies use one kind; others have adopted other kinds. Couplers of each kind will couple automatically with others of the same kind or construction. But some couplers will not couple automatically with couplers of different construction. Railroad companies engaged in interstate commerce are required to haul over their roads cars equipped with all these couplers. They can not relieve themselves from this obligation or renounce this public duty for the simple reason that their cars or locomotives are not equipped with automatic couplers which will couple with those with which the cars of other roads are provided, and which will couple with equal facility with those of their kind. These facts and this situation were patent to the Congress when it enacted this statute.

Opinion below.

It must have known the impracticability of providing every car with as many different couplers as it might meet upon a great system of railroads, and it made no such requirement. It doubtless knew the monopoly it would create by requiring every railroad company to use the same coupler, and it did not create this monopoly. The prohibition of the statute goes no farther than to bar the handling of a car "not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the car." It does not bar the handling and use of a car which will couple automatically with couplers of its kind because it will not also couple automatically with couplers of all kinds, and it would be an unwarrantable extension of the terms of this law to import into it a provision to this effect. *A car equipped with practical and efficient automatic couplers, such as the Janney couplers or the Miller hooks, which will couple automatically with those of their kind, fully and literally complies with the terms of the law, although these couplers will not couple automaiically with automatic couplers of all kinds or constructions.* The dining car and the locomotive were both so equipped. Each was provided with an automatic coupler which would couple with those of its kind, as provided by the statute, although they would not couple with each other. Each was accordingly equipped as the statute directs, and the defendant was guilty of no violation of it by their use.

The above-quoted language discloses a total misapprehension on the part of the court of the scope and purpose of the law and the intent of the Congress in its enactment. Had the court below been informed as to the history of this legislation it would have known that the very language of the statute, which is quoted in support of its opinion, was adopted by the Congress, only after discussion, for the purpose of bringing about the condition which seems abhorrent to the court, namely, *complete uniformity and interchangeability of couplers* on all railroads engaged in interstate commerce. That was the very thing that the Congress had in view when it enacted this legislation.

Uniformity and interchangeability.

The condition which existed when Johnson was hurt was fully understood and appreciated at the time the act was passed. As was stated in the Senate during the debates attending the passage of the act, the question of uniformity in couplers being under consideration, "*How does that meet the difficulty that the railroads using their best endeavor at the present time, this best endeavor being used on different roads, reach different conclusions on different roads? Road A, using its best endeavor, reaches one conclusion and puts in one form of appliance; road B, using its best endeavor, puts in another form of appliance. If these two appliances brought together, because of their want of uniformity, beget fatality to human life, does the argument of best endeavor remove that difficulty?*"

Here was a railroad company undertaking to use two different types or styles of couplers together,

necessitating the use of the deadly link-and-pin to effect the coupling. A study of the history of the conditions will clearly develop the fact that it was not the so-called deadly link-and-pin that railway employees were protesting against, but it was the increasing casualties due to the lack of uniformity and interchangeability of the couplers in use before the enactment of the law.

Years previous to the passage of the law the Master Car Builders' Association, representing practically all the railroads in the United States, had adopted a uniform type of coupler which would work interchangeably with all other couplers of the same type, but while the railroads had adopted what is known as the Janney or Master Car Builders' Coupler as a standard type, it was not coming into general use as fast as the necessities demanded, for, during the transition period, men were required to go between the cars to couple and uncouple at a much greater hazard than before.

The interpretation of this law by the Interstate Commerce Commission, to whom was intrusted the extension of time to the railroads for "good cause," with respect to the necessity for uniformity is shown by the following quotations from its annual reports:

Uniformity.

UNIFORMITY IN COUPLERS.

[Fifth Annual Report, 1891.—Appendix G.

> One of the chief causes of the deaths to railroad trainmen in the pursuit of their occupation may be attributed to the great variety of couplers used in coupling cars. * * * The justice of the demands of the railroad employees

Uniformity.

for uniformity in safety appliances, more particularly in car couplers, can not be questioned, and can better be appreciated when the difficulties which the trainmen encounter daily and hourly in coupling and uncoupling cars is understood. Under existing conditions, when there are so many couplers in use, it is impossible for men to know before going between the cars whether they have the ordinary links and pins to couple together, or two different types of the large variety of couplers now in use. No matter what coupler is used, no matter how perfect its mechanism and working, if it does not couple as well and as freely with every other coupler now in use as it will with another coupler of its own make, it is to that extent a death trap. What the railroad employees of the country demand is uniformity. They want all couplers alike, and they are the men whose lives and persons are at stake, for with about a million freight cars in use the change to any particular coupler must cause a great injury to their number, and loss of life in bringing it about. This great element of uncertainty, coupled with the danger to life and limb in consequence of such uncertainty, should be remedied, so that trainmen when coupling and uncoupling cars may know that the *couplers will be of the same type.*

[Sixth Annual Report, 1892, pages 69 and 70, text of report.]

It should not be lost sight of that the end to be attained is uniformity in railway safety appliances. * * * The desirability of securing uniform appliances is not only insisted upon

Uniformity.

by the employees, but is conceded by most railway managers, and an effort has been made by the railroads themselves to secure this result. But the predilection of different managers for one or another style of coupler or other appliance, and the disposition of each company to insist that no particular pattern shall be adopted as the standard, make it extremely difficult to secure uniformity by the voluntary action of the railways.

[Seventh Annual Report, 1893, page 76. After the passage of the act.]

In the matter of couplers the aim of the law is that the men shall not be required to go between cars in order to couple or uncouple them, and *therefore a road must not only equip its own freight cars with couplers that are interchangeable, but can not use upon its line the cars of other roads which do not automatically couple with their own.*

[Tenth Annual Report, 1896, page 94.]

Many of the couplers claimed to be automatic only couple automatically with those of the same pattern or type, and not with the couplers in more general use. *Equipment of cars with this class of couplers will apparently compel the owning carriers to confine their use to roads using similar types and to trains composed entirely of cars so equipped.*

[Sixteenth Annual Report, 1902, page 61.]

Plainly, if carriers use different types of couplers which do not work automatically with each other, the law is violated when a carrier

undertakes to haul two cars so equipped in the same train. This was pointed out by the Commission in its report to Congress for the year 1893, and has been generally understood and followed by carriers throughout the country.

Extensions of time.

It is inconceivable that the Interstate Commerce Commission would have granted extensions of time within which to comply with the law if it had held a view similar to that expressed by the circuit court of appeals in the following language:

> For the reasons which have been stated, this statute may not be lawfully extended by judicial construction beyond the fair meaning of its language. There is nothing in it which requires a common carrier engaged in interstate commerce to have every car on its railroad equipped with the same kind of coupler, or which requires it to have every car equipped with a coupler which will couple automatically with every other coupler with which it may be brought into contact in the usual course of business upon a great transcontinental system of railroads.

The statistics which the Commission was annually compiling showed an increasing or diminishing number of fatalities in proportion to the attainment of complete uniformity and interchangeability (see Appendix) to attain which condition the railroads were petitioning the Commission for more time. *The railroads were striving to do the very thing which the court below says they were not required to do.*

The circuit court of appeals lays down a requirement of law which, if it exists, is more honored in the breach than in the observance, when it announces that—

Equipment.

> Railroad companies engaged in interstate commerce are required to haul over their roads cars equipped with all these couplers. They can not relieve themselves from this obligation or renounce this public duty for the simple reason that their cars or locomotives are not equipped with automatic couplers which will couple with those with which the cars of other roads are provided, and which will couple with equal facility with those of their kind.

This varies from the actual methods of interchange in use between railroads and seems odd to everyone who is familiar with the subject. Only an entire failure to have understood the true situation could have misled the court into making such an announcement, for railroads have well-defined rules of interchange which have existed for nearly a generation, and no road will haul a car of any other road unless it is acceptable to them in the matter of equipment. If the equipment or the application of appliances on any car did not comply with the rules of interchange a railroad company would or could decline to accept the car from the connecting carrier.

A railway company is not, as a carrier of freight and passengers, under any obligation to take freight from a connecting road in the cars of the latter and transport it in such cars while its own cars are not in

use, in the absence of any controlling custom among railroads.

Oregon Short Line & U. N. R. Co. v. *N. P. R. Co.* (51 Fed. Rep., 465).

Interstate Commerce Commission, in the case of *Michigan Congress Water Co.* v. *Chicago and Grand Trunk Railway Co.* (2 I. C. C. Rep., 594), held that a railroad company, as a common carrier, has a right to refuse to transport any car which is in an unsafe condition.

Duty of carrier.

It is one of the duties of a railroad company as a common carrier to receive and transport over its line of road cars of other companies, if the gauge of the road is suitable, and the cars are not defective or out of repair, or of such unusual and peculiar construction as to be unreasonably hazardous or dangerous to work with or handle. *Chicago, etc., R. Co.* v. *Curtis* (*Neb.*), (71 N. W. Rep., 42).

Where companies controlling connecting lines of railway transport over their respective lines loaded freight cars of the other, under a traffic arrangement by which they share the earnings, and one company delivers to the other, to be transported over its line, a car that is so defective in its equipment as to be dangerous to handle, and which should have been inspected and repaired before being so delivered, and in consequence of such defective condition of the car an employee of the latter company receives an injury while handling it in the course of his employment, the negligence of the former company in delivering the car for transporta-

tion without proper inspection and repair is the proximate cause of the injury, although the employer company should also have made an inspection of the car when it was received, and was negligent in that duty; the negligence of the latter company, while contributing to produce the injury, is not an independent cause, breaking the casual connection between the injury and original negligence of the company furnishing the car for transportation; and either company, or both, may be held responsible, at the election of the party injured. *Pennsylvania R. Co.* v. *Snyder* (Ohio, 1896), (45 N. E. Rep., 559.) Duty of carrier.

A railroad company is not required, as a common carrier, to take a circus train, a part of which is loaded with wild animals, and transport the same over its line, but may refuse to transport such train, except under a special contract limiting its liability to that assumed by a private carrier.

Wilson v. *Atlantic Coast Line R. Co.* (129 Fed. Rep., 774). (Citing with approval the case of *Chicago N. & St. P. R. R. Co.* v. *Wallace*, 66 Fed. Rep., 506, decided by the circuit court of appeals.)

Said Mr. Justice Harlan in the case of *Baltimore & Potomac Railroad Company* v. *Mackey* (157 U. S., 72, 91):

> We are of opinion that sound reason and public policy concur in sustaining the principle that a railroad company is under a legal duty not to expose its employees to dangers arising

from such defects in foreign cars as may be discovered by reasonable inspection before such cars are admitted into its train.

The Southern Pacific Company, for years before the passage of the law, had made it an invariable rule that unless cars were equipped with air brakes or pipes for the same they would decline to accept them, notwithstanding the fact that they might be loaded with through freight bound from ocean to ocean, and would compel such equipment to be put on before they would send such cars through.

It is no excuse on the part of the railroad company that the car with which passengers or employees were killed or injured is owned by another carrier, although they have accepted and hauled it. (*Felton* v. *Bullard*, 94 F. R., 781; *B. & P. R. R.* v. *Mackey*, 157 U. S., 72.) At every junction point, from time immemorial, inspectors have been located, and no road accepts cars until such inspectors have passed upon the safety of their equipment and appliances.

As to coupler monopoly.

It is quite true, as stated by the court below, that the Congress "knew the monopoly it would create by requiring every railroad company to use the same coupler, and it did not create this monopoly." There were at least 37 different styles or makes of couplers which were included in the M. C. B. or Janney type adopted by the railroads as a standard, *all having the same contour lines*, so that it will readily be seen that the adoption of the type, or a type, *could not result in a monopoly*. It avoided this by prescribing merely a

condition that must be met, namely, that couplers must be used which will "*couple automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars.*" The Congress left the railroad companies free to adopt such couplers as they saw fit, providing only that when such couplers were brought into contact with other couplers in the ordinary course of business they would "couple automatically by impact," and could be "uncoupled without the necessity of men going between the ends of the cars." The sole purpose of the law was to prevent the thing which Johnson was compelled to do when he received his injury. It was sought to do away with the necessity for men to go between the ends of the cars for the purpose of performing the operations necessary to couple them together or to uncouple them. Mr. H. S. Haines, president of the American Railway Association, expressed this clearly before the House committee which had this law under consideration, as follows:

No coupler monopoly.

Views of Mr. Haines.

> Now, I want to say that the test which you should apply to any proposed legislation is this: What you would be required to do in the interest of these people who are being injured. The test should be, Are you required to lay down a law distinctly as to this or that particular pattern? Are you required to lay down a law as to this or that type? Now, I say no, and I think I can show you why. The man who manipulates that coupler has no interest whatever in the type or locking device or any of the parts connected with it. He can handle it and know nothing

Views of Mr. Haines.

about its internal construction, what its lines are, or anything of that kind. Why? Because all he requests is that he shall not be *required to go in between the cars to do the coupling.* If he can handle those cars in the performance of his duties so that *he is not required to go in between them*, that is all that concerns him. * * * There are two hundred thousand automatic couplers in use on freight cars. But there are a number of devices, and as long as *they will couple together*, I do not think Congress ought to prescribe any particular one. As long as the man can stand at the side of the car I do not think it in the interest of humanity that you are called on to go further than to prescribe that the man *shall be able to manipulate the coupler without going in between the cars.* (Hearings before the House Committee on Interstate and Foreign Commerce in relation to the bill for the protection of trainmen, etc., pages 3, 4, and 7, February 18, 1892.)

On page 8 of this same document, and at this same hearing, Mr. Haines, one of the greatest authorities upon railroading in the United States and their chosen representative at the hearing, said in regard to the actual practice of interchange of cars and of the commonly understood right to refuse cars not equipped as required by law:

> As soon as the railroads which are in line with this improvement—and I have told you that by far the largest mileage in this country is in this association—as soon as they get their own cars,

a sufficient number of them, equipped with this type they will put a regulation into effect that they will not receive cars that have not couplers of a like type. They are going to say, "We are not going to have our men mashed up any more. We can protect our men and we do not require them to go in between cars to couple cars, and if our neighbor comes with an old coupler we won't take the car if our man has to go in between the cars." Some one will say, "How can you do that?" When I hear that said I feel very much like replying as Columbus did in regard to the egg, as to how he would stand it on its end. It is done. Let a man come here with a passenger car with a link and pin coupler and see if it would be hauled. The car inspectors would put a chalk mark on that car and that would be the last of it. * * * Therefore, I say that the lines in line with us on this subject will finally say they can not continue to have their men hurt by the use of the old couplers. * * * I think we can fix it for ourselves just as soon as we get a sufficient number of our cars equipped. Mr. Haines.

At a hearing before the Senate Committee Hon. George G. Crocker, chairman of the railroad commission of the Commonwealth of Massachusetts, said: Mr. Crocker.

> With reference, therefore, to the question of couplers, there is a peculiar element involved in the problem, and that is that it is not sufficient for each road to adopt a form which is in itself good. It is necessary that each road and that all roads should adopt a uniform kind of coupler, or, in other words, couplers which will

be *interchangeable, which will work automatically with each other.* (Hearings before the Senate Committee on Interstate Commerce on S. 811, February 10, 1892, page 26.)

Senate committee.

These requirements were strongly emphasized by all the witnesses that appeared before the committees of Congress, and in its report recommending the passage of this bill the committee of the Senate said:

> The necessity of national legislation looking toward *uniformity* in railway safety appliances is apparent, since it is admittedly a subject with which the various States can not successfully cope. Their incompetency to meet the situation is illustrated by the fact that the legislatures of Massachusetts, Iowa, Mississippi, Nebraska, Minnesota, New York, Ohio, Michigan, Wisconsin, and of other States, realizing their own inability to afford an adequate remedy, have called upon Congress to act. Were the use of freight cars limited to a single State then State laws would be adequate, but the cars within any State at any particular time are largely such as pass from road to road and from State to State indiscriminately, no State line being recognized in railway traffic. The freight car of Massachusetts loaded with the products of that State may in three weeks reach California, passing from ocean to ocean; or the car of an Illinois road may pass through three or four States in a less number of days on its journey from the Lakes to the Gulf. Either of them may have the coupler sanctioned by the State from which it started, but *from its lack*

of interchangeability with the couplers of those cars with which it must be coupled to perform its mission of transporting the commerce of the country it produces death and destruction in every freight yard it enters. (Senate Report No. 1049, Fifty-second Congress, first session, page 5.)

On this subject the House committee reported as follows: House committee.

> WITHOUT UNIFORMITY THE DANGER TO EMPLOYEES IS FULLY AS GREAT AS WITH THE OLD LINK AND PIN COUPLER and hand brake, and representatives of the switchmen and trainmen who appeared before the committee stated that *unless there could be uniformity they would prefer to go back entirely to the old link and pin*—that the danger had increased from the use of so many different types; which statement seems corroborated by the large increase in casualties appearing in the statistics of 1890 over those of 1889. * * * The committee recognize that it is a serious question whether the best type of coupler has yet been devised, but they believe that if the railroads of the country are compelled to act, and reasonable time is given for them to come together, the result will be the adoption of some *uniform interchangeable type of coupler.* (House Report No. 1678, Fifty-second Congress, first session, pages 3, 5.)

As was stated by Mr. W. E. Rodgers, chairman of the National Committee on Safety Appliances, appointed by the National Convention of Railroad

Commissioners, and who testified before the Senate committee on February 10, 1892:

Mr. Rodgers.

> In consequence of the large number of employe es of railroads who are injured or killed in this dangerous occupation, the subject was taken up by the various State legislatures, beginning about ten years ago by the passage of laws in the different States requiring railroad companies within the respective States to equip their cars with an automatic coupler. * * * Acts were passed compelling the adoption of one of several couplers. A time was set within which the corporations were to conform to this act. The result was that one railroad would adopt one coupler, another would adopt another coupler, and the result was confusion confounded. In consequence of the interchange of cars from one State to another, the fact was soon developed that a car coming from Ohio to New York equipped with one coupler would not couple with the coupler that had been adopted by the railroad that it found in the State of New York, and thus the dangers became greater. (Hearings before the Senate Committee on Interstate Commerce on Senate bill 811, February 10, 1892, page 4.)

The following quotations from bills that were presented to the Congress will still further emphasize the fact that the question of uniformity and interchangeability was ever before the Congress. Section 7 of a bill introduced into the Fifty-first Congress, on April 12, 1890, reads as follows:

> That whenever any railroad company, corporation, person, or persons engaged in the transportation of interstate commerce on any railroad shall have equipped their rolling stock, either prior to or by the time of the dates fixed in this law with such automatic safety appliances as contemplated in this act, such corporation, company, person, or persons, may lawfully refuse to receive cars for transportation over their own lines or for switching purposes from lines of connecting roads that are not equipped with such automatic safety appliances as will work, interlock, and interchange automatically with the system of automatic couplers and brakes in use on its own rolling stock.

Bills.

This bill was H. R. 9682 and S. 3665. In this same Congress, on May 27, 1890, H. R. 10555, "For the selection of a uniform type of coupler," was introduced. Section 2 of this bill provided, among other things, that whatever type of coupler should be selected "it shall admit of its coupling with other types of couplers now in use until such time as all cars will be equipped with its own kind."

In the Fifty-second Congress, on December 14, 1891, S. 811 was introduced, section 7 of which was the same as section 7 of S. 3665 quoted above, and on January 5, 1892, H. R. 117 provided (section 6) as follows:

> That the main design of this law being this, namely, greater safety to employees in handling cars and running trains which may be engaged in moving interstate commerce, it requires all

> persons, companies, or corporations owning or using such cars and trains to adopt a uniform system of coupling and uncoupling such cars, and it enforces upon all such parties engaged in interstate commerce the universal use on all their cars of the standard type of safety couplers as established by the majority of such persons, companies, and corporations, through the American Railway Association, and the so-called safety couplers mentioned in this act must be uniform in their action, so as to be interchangeable upon all the cars on any railroad engaged in the interstate commerce, and they must be such as will not require the men to stand between the ends of the cars when the act of coupling is done or require them to go between the cars to uncouple them when in a normal condition.

Federal legislation was necessary, and the Congress had before it the problem of requiring interchangeability of couplers *without creating a monopoly* that would inure to the benefit of the owner of any one coupler at the expense of all the others.

Patents on couplers.

At the hearings before the committees of Congress the fact was brought out that there were over 7,000 patents covering safety car couplers in the United States. The selection of the best out of this mass of inventions was a very serious problem, especially when the selection was to be made without creating a monopoly in favor of any particular person, firm, or corporation. The railroads had already rendered very material assistance to the solution of this problem.

THE RAILROADS HAD ADOPTED A UNIFORM INTERCHANGEABLE TYPE OF COUPLER.

At a meeting of the American Railway Association in 1878 the attention of the association was called to the importance "of having the several patterns of self-couplers to be so designed as to COUPLE INTERCHANGEABLY," and the association laid down the principle "that all safety couplers must be without link and pin and couple INTERCHANGEABLY." (Page 44, American Ry. Management, by Haines.) This association represented a great majority of the railway mileage of the country, and the principle thus laid down by it was the germ of the action which finally led to the adoption by the railroads of a single *type* of coupler, known as the "vertical plane," or "Master Car Builders'," or "Janney" type. M. C. B. type.

In 1887, or previous to the introduction of this question into Congress, the executive committee of the Master Car Builders' Association, as the result of exhaustive tests made under its direction to determine the best form of automatic coupler to meet all the conditions of service, reported "that this association recommends as a standard form of coupling the Janney type of coupler; that the association procure one of the present make of Janney coupler, selection being made by a committee appointed for that purpose, and then all other forms of couplers that will automatically couple to and with this coupler, under all conditions of service, are to be considered as within the Janney type, and conforming to the standard of this association." (Proceedings of M. C. B. Assn., 1887, page

M. C. B. type. 194.) This recommendation was adopted, and at a meeting of the association in 1888 the Janney type of coupler was adopted as a standard of the association. (Proceedings of M. C. B. Assn., 1888, page 169.)

The Master Car Builders' Association represented about 90 per cent of the railroads of the country, and following this action on its part, on June 17, 1888, the Janney Car Coupler Company agreed to waive all claims for patents on contour lines of coupling surfaces of car couplers used on railroads members of the Master Car Builders' Association, and the association said: "The standard of the association is, therefore, with the publication of these lines, definitely fixed, and it is in the power of any inventor or manufacturer of couplers, now or hereafter, to determine for himself whether his coupler will *automatically couple to and with this standard under all conditions of service.*" (Proceedings of 1888, *supra.*)

This is what the railroads themselves had done previous to the introduction of any bill into the National legislature providing for the adoption of such couplers as would not require men to go between the cars to operate. They had selected a *type*, conformity to the contour lines of which would render all makes of couplers *interchangeable*, and these contour lines had been made free, had been dedicated by the inventor to the use of the public, so that all manufacturers or inventors were at perfect liberty to use them.

At the time of the passage of this statute there were thirty-seven patents covering couplers which followed

these contour lines, and by reason of their uniformity with respect to the matter of contour lines these thirty-seven different couplers were INTERCHANGEABLE with each other, although each was different from all the others in some detail of construction. The differences in construction which were covered by patent generally referred to some detail of the locking or uncoupling arrangement, and had no reference to the contour lines or the interchangeability. Representatives of the railroads came before the committees of the Congress with models of these different makes of Master Car Builders' couplers and demonstrated by actual test to the members of the committees that by reason of their uniformity in the matter of contour lines these different makes of couplers would work *interchangeably*.

In addition to this class of couplers known by the generic name of "Vertical Plane," or "Master Car Builders'," or "Janney" couplers, there were a number of automatic couplers which were *interchangeable only with those of their own make or patent, of which the Miller hook was one which was confined to passenger traffic*, the adoption of any one of which would have made such coupler the standard, and would have rendered useless the 200,000 Master Car Builders' or Janney couplers then in service, because whichever one of such couplers might be selected as the standard *would not be interchangeable* with those of the Master Car Builders' type. Such action on the part of the Congress would have confined the railroads engaged in interstate commerce to the use of one particular kind of coupler, and would have created a monopoly in its favor. These various couplers all had their own partic-

Interchangeability.

ular champions, and great pressure was brought to bear upon the Congress to decide in favor of some one particular coupler, or to appoint a commission for the purpose of making tests of all couplers on the market, with power to fix a standard. The effort of the champions of these couplers of other types was to prevent any legislation that would result in fixing the Master Car Builders' type of coupler as the standard of the country. The proposition to fix a standard by means of a commission was resisted by the representatives of the railroads that were members of the Master Car Builders' Association, for the reason that they had already adopted a standard, through the action of their association, which standard was the result of expert knowledge and practical tests extending over a number of years, and it was urged that the decision already arrived at was as valuable, and perhaps more so, than any decision that could be arrived at by a commission created by the Congress.

Legislation.

The matter thus developed into a contest between the Master Car Builder's type of coupler and the other types or makes of couplers, and it was an exceedingly difficult matter for the Congress to decide without seeming to unjustly favor some particular interest. In its report recommending the passage of the law now under consideration the committee of the House acted upon the following suggestion, which had been made by a friend of the law: "I would urge upon the committee not to report any measure which would legislate in favor of any particular type of coupler. Such legislation, it seems to me, would not be fair to all inter-

ested in inventions, to the railroads as a body, or to the man employed. * * * I would make them (the railroads) decide upon a coupler which would meet the requirements as to use in every bill prescribed here."

It will thus be seen that in adopting the language of the statute, the Congress did so with a deliberate purpose and with a full knowledge of the requrements of the situation. The purpose was to *compel the railroads of the country to act*, and by prescribing the condition that couplers must be used which would "couple automatically by impact," and which could be uncoupled "without the necessity of men going between the ends of the cars," the responsibility for the adoption of a uniform interchangeable type of coupler, which would obviate the necessity for men to go between the ends of the cars, was placed upon the railroads, where it properly belonged. Indeed, the railroads invited this responsibility. The trend of all the arguments of the representatives of the railroads before the committees of the Congress was to the effect that, through the action of the Master Car Builders' Association, an organization representing about 90 per cent of the railroads of the country, they had already adopted an interchangeable *type* of coupler, and if permitted to work out the problem in their own way, without being hampered by restrictive legislation, the result would be the final adoption of a coupler that would be interchangeable on all the railroads of the country, whereas if the Congress prescribed a partic-

Conditions called for.

Result.

ular coupler as a matter of law, or left the matter to the decision of a commission created by law (which was the purpose of many of the bills before the Congress), the result would be to relieve the railroads of the responsibility for the selection of a coupler that would best meet the requirements of the situation, would stifle the movement toward progressive improvement of couplers, and very likely result in the adoption of an inferior form of coupler, which would thus become the standard of the country, to the injury of the very men who were intended to be benefited by the law, as well as to the injury of the railroads.

For a number of years previous to the enactment of the statute now under consideration the Congress had had the subject of safety-appliance legislation constantly before it. Demands that something be done to stop the terrible slaughter of men engaged in the operation of railway trains were practically unceasing, and numerous bills were introduced into the Congress looking to that end.

State legislation on the subject of safety couplers had utterly failed, for the very reason that such legislation was unable to secure the thing needed, namely, *uniformity and interchangeability.*

The above statement of legislative history clearly shows the intent of the Congress and the purpose of the statute, and the opinion of the circuit court of appeals that "It does not bar the handling and use of a car which will couple automatically with couplers of its kind because it will not also couple automatically with couplers of all kinds," is entirely unsupported.

The Commonwealth of Massachusetts was one of the first to act in the matter of adopting those measures which led to the safety-appliance acts. In the report of the railroad commissioners for the year 1884 it is stated in part, that— Mass. R. R. Repts.

> It has also been hoped that when such a Commonwealth as Massachusetts should join Connecticut, which has the honor of leading in this humane movement, its example might have weight with other States. * * * One reason for delay that has hitherto been urged with some success, has been the hope that the Master Car Builders' Association would agree upon some one standard freight coupler which would be adopted by all the railroad companies of the country, and so prevent the necessity of legislation.

It may be seen that uniformity was the prevailing object from the following:

> Uniformity was clearly desirable, but it did not involve the purchase of a patent right or the rival claims of inventors. In the selection of an automatic coupler the question is complicated by conflicting interests, and in its adoption the obstacle of cost is a serious one. It is probable that the freight-coupler question will never be satisfactorily settled until the law of liability of employers to employees has been thoroughly revised. The working of a just law covering this whole subject would be likely to supersede the necessity for special legislation as to couplers or drawbars.

Mass. R. R. Rpts.

In the report for 1886 mention is made of the act of 1884, chapter 134, which did not go into effect until March 1, 1885. In this report the Commission said:

> Safety is to be found not only by selecting good devices, but by limiting their number. The ideal of safety will only be reached, if ever, when one universal coupler is adopted. If it were shown that a sixth newly invented coupler were just as good as any one of those already selected, it would not follow as of course that it ought to be approved. To reduce rather than increase the number of couplers in use is the way to gain safety. * * *
>
> The action of the Commonwealth in prescribing the use of safety couplers by law has been subjected to severe criticism. At the meeting of the Master Car Builders' Association in June, a member of the convention (not a master car builder) stated as a fact that "the action of the Massachusetts legislature had cost more lives than the old system, as there was no uniformity in the couplers put on.

In the report of 1888 it is stated (page 54):

> No single State can enforce uniformity in the matter of freight-train brakes and automatic couplers, and it is also obvious that there would be a great difficulty and probably much delay in securing Congressional action. There is, however, reason to hope that the leading lines of railroad will now take up these two questions without waiting for State or Congressional compulsion, and that uniformity throughout the country may practically be attained. * * *

> It may be that progress toward uniformity may be hastened or encouraged by the holding of a convention of railroad commissioners or of railroad officials. It may be that legislation will be desirable. Failure means that hundreds of men will be injured or killed every year. Success means that they shall be saved. Mass. R. R. Repts.

In the Railroad Commissioners' Report of 1891, on page 31, it is said:

> While this discussion as to the merits of the various couplers is going on, brakemen are being unnecessarily mutilated and killed. These accidents will practically cease when every freight car is equipped with a coupler which will couple automatically with the coupler on any other freight car, and which a brakeman can uncouple without being obliged to go between the cars.

From the authorities cited and the history of this statute it must be apparent to all thinking men that it never was intended by the Congress that the law should be as stated by Sanborn, J., that it was no violation of the statute to undertake to couple together two cars each equipped with automatic couplers but which would not couple together, and there certainly exists no necessity for any such construction of the statute against such apparent intention. The conclusion is irresistible that whatever cars the railroad undertakes to couple together, when either of them is being used in interstate traffic, they must both be so

equipped that they will couple automatically by impact without the necessity of men going between the cars.

As shown by the petition of the Southern Pacific Company for an extension of time, dated October 4, 1897, the number of engines belonging to the company on September 1, 1897, was 1,005, of which none were equipped with automatic couplers, while on November 16, 1899, upon the company's second petition for an extension of time, it was shown that on October 1, 1899, they had 1,032 engines, of which 544 were equipped with automatic couplers; and they asked for an extension to equip 488 engines, and, as was shown by the fact that the engines were equipped with the Janney or Master Car Builder's coupler, they had complied with the law in that respect and recognized the necessity for uniformity in coupling equipment. (Vol. VIII, I. C. C. Repts., 643, 666.)

Dining car.

THE DINING CAR "DEL MONTE" WAS USED IN MOVING INTERSTATE COMMERCE.

The evidence shows that the dining car "Del Monte" was used regularly to move interstate commerce between San Francisco, Cal., and Ogden, Utah, and there was no evidence to show it was ever used for anything else. Mr. Rowland, the train dispatcher of the company, testified that it had been used between these points for over four or five years (record, p. 20). Therefore, it was not only regularly used in connection with other cars which were loaded with interstate commerce, i. e., passengers traveling from one State to another, but it

was regularly engaged in *actually* moving interstate commerce in so far as it carried passengers destined from one State to another while they ate. This car was a part of the defendant's equipment built for the purpose of what? Not of alone furnishing such passengers a place to eat, but to also furnish them with a means of transportation whereby they could proceed on their journey while they ate, thus combining the means of transportation and that of furnishing food to passengers, and thereby securing greater dispatch of such interstate travel between Ogden, Utah, and San Francisco, Cal., than could be obtained by a system through which the means of transportation and that of furnishing meals were separate and distinct, i. e., the stopping and detaining of trains at intervals along the road while passengers eat at eating stations.

Interstate character of dining car.

The circuit court of appeals says that at the time of the accident the dining car was not used in moving interstate commerce. It is sufficient to show that the car was used in moving interstate commerce in a general way, and this is shown by the evidence. Section 2 of the act of Congress of March 2, 1893, reads: "It shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car *used in moving interstate traffic.*" Was it not the custom of the defendant to *use* this dining car in transporting passengers between the State of Utah and the State of California?

In *Voelker* v. *Chicago, Milwaukee and St. Paul Railway Co.*, in the circuit court for the northern district of

Iowa, eastern division, in interpreting this provision of the statute the court said (116 F. R., 867 at 873):

> The beneficent purpose of these statutes is defeated if the employees are required to handle cars not equipped as required by the statutes, without regard to the question whether the cars are loaded or not. * * * When companies, like the defendant in this case, are engaged in interstate traffic, it is their duty, under the act of Congress, not to use in connection with such traffic cars that are not equipped as required by that act. This duty of proper equipment is obligatory upon the company before it uses the car in connection with interstate traffic, and it is not a duty which only arises when the car happens to be loaded with interstate freight. It frequently happens that railway companies load cars with live stock or farm produce in Western States and carry the same to the eastern markets, and then return these cars without a load; but it can not be true that on the eastern trip the provisions of the act of Congress would be binding upon the company because the cars were loaded, but would not be binding upon the return trip because the cars are empty. Whenever cars are designed for interstate traffic the company owning or using them is bound to equip them as required by the act of Congress; and when it is shown, as it was in this case, that a railway company is using a car for transportation purposes between two States, sufficient is shown to justify the court in ruling that the act of Congress is applicable to the situation.

Interstate character of traffic.

In *Crawford* v. *New York Central and Hudson River Railroad Company* (10 American Negligence Reports, 166), the court in charging the jury gave expression to the following: Interstate character of dining car.

> The other claim of the defense is that as to these particular cars they were not in use for interstate commerce, because they were not on the road in matter of transit at the time, but were in the yard itself. As to that I charge you if the cars were cars engaged and being used in interstate commerce, it matters not whether they were being made up in the yard or were moving at the time out on the road, because the statute is intended to protect brakemen against the danger of such work, so far as it can protect them against such dangers, and it matters not whether interstate commerce cars were being made up to start out on the road or whether they were actually moving along between the States at the time, so far as the purpose and intent of the statute is concerned. In fact, *in the making up*, there is more necessity for the brakemen to be at their work, coupling the cars, bringing them together, than in the operation of the cars after they once start out from New York for Boston, New Haven, Chicago, or elsewhere.

But the circuit court of appeals says: "The dining car in this case was standing empty on the sidetrack. * * * If the defendant had drawn it vacant over every foot of its railroad, * * * it would not have fallen under the ban of the statute." Such a construction of the law when followed to a conclusion destroys

C. C. A. on travelers.

a very great portion of the safety intended by Congress to be thrown around railway employment and railway travel in general when it enacted this law. The learned court failed to recognize the important fact that the purpose of the act was to give protection not only to those employees who might be actually employed upon the particular cars or trains upon which these safety appliances are in use, but also to protect other employees and *travelers* who were employed or *traveling* upon other cars or trains of the same common carrier which came in contact with them. For example, let us say the defendant did put this dining car in a train and run it over its road empty, and owing to the fact that it was not equipped with the safety appliances required by the act of Congress it would collide with another train which contained interstate traffic—passengers traveling from one State to another—and some of these passengers, or employees upon said train, should be killed or injured. Would this not be a violation of the law? That the statute was intended by Congress to cover such conditions is evidenced by the following quotation, which is taken from House committee's report on H. R. 9350, which was the bill that became law: "When the rails are in constant use by passenger and freight trains indiscriminately, running within a few minutes of each other, the driving brake and the train brake are essential means of safety to the traveler and the employee alike." (House Report 1678, Fifty-second Congress, first session, p. 5.)

But the circuit court of appeals says: "But this statute must be read not only in the light of the rules

Effect of opinion of court below.

of construction, * * * but also in view of the power of Congress in this respect. It is by virtue of the power granted to Congress to 'regulate commerce among the States,' and by virtue of that authority alone, that this statute was enacted and has efficacy." If Congress has the authority to protect travelers upon railroads and the employees upon the trains on which they are hauled by requiring safety appliances upon such trains, why has it not also the authority to protect them further by requiring that all other trains and cars with which they are brought in contact shall also be so equipped? *Why can Congress protect the man on the train which crashes into another train and not protect the one on the train which is run into?* That the power of Congress is a broad one see *Hanley* v. *K. C. S. R. R.* (187 U. S., 617).

The one great reason for Congressional action regarding safety appliances was to establish uniformity throughout the entire country, something that could not be accomplished by State legislation for the reason that one State could require one type of a coupler while another State would require a different type, and when these couplers were brought together they would not interchange, thus causing not only danger to employees, but delay to interstate traffic as well. In *Mobile* v. *Kimball* (102 U. S., 691), this court held that when the establishment of a uniform system of the entire country is necessary, the grant of power to Congress is exclusive, and any police regulation of the State interfering must give way.

Canal-boat case.

In a recent case this Court assumed jurisdiction over the repairs made in dry dock in Niagara County, N. Y., on a canal boat in order to maintain and give effect to that clause of the Constitution conferring admiralty and maritime jurisdiction on the United States courts. (*The R. W. Parsons*, 191 U. S., p. 17.)

Yet the circuit court of appeals lays down as a matter of law that—

> It is not, then, unlawful, under this statute, for a carrier to haul a car not so equipped which is either used in intrastate traffic solely, or which is not used in any traffic at all. It would be no violation of the statute for a carrier to haul an empty car not used to move any interstate traffic from one end of its railroad to the other. It would be no violation of the law for it to haul such a car in its yards, on its side track, to put it into its trains, to move it in any manner it chose. *It is only when a car is "used in moving interstate traffic" that it becomes unlawful to haul it unless it is equipped as the statute prescribes. On the day of this accident the dining car in this case was standing empty on the side track.*
>
> * * * * *

Empty car.

The car was vacant when it went to the turntable, and vacant when it returned. It moved no traffic on its way. How could it be said to have been "used in moving interstate traffic" either while it was standing on the side track or while it was going to and returning from the turntable? If the defendant had drawn it vacant over every foot of its railroad, it would not

have been engaged in moving interstate traffic, and it would not have fallen under the ban of the statute. How can it thus fall because it was moved in the same way over a small portion of the road? The argument of counsel for the plaintiff is that because it had been used in moving interstate traffic on its way from San Francisco to Promontory, and because it was the intention of the defendant to put it to the same use in a few hours, when a west-bound train arrived, it was impressed with the use of moving such traffic in the interim. * * *

Empty car.

Is the turning of a vacant car which its owner intends to use at some future time in moving interstate traffic any part of commerce among the States? Does the intention of the owner as to a future use of an implement of transportation affect the character of the act of turning this car? If the defendant had intended to use this dining car for traffic within the State of Utah only, if it had intended to send it to the shop to be destroyed or repaired, or if, after the car was turned, it had changed its intention and concluded that it would not use it to move interstate traffic, would any of these intentions or this change of purpose have affected the act of turning the car, and have impressed it with a use in interstate commerce or intrastate commerce? The only answer to these questions is a negative one, and, if this be true, then the intention of the defendant to use this car at some future time in interstate commerce would not make the act of turning it a part of such commerce, nor bring it under the

ban of the act of March 2, 1893. The opinion and decision of the Supreme Court in *Coe* v. *Town of Errol* (116 U. S., 517, 525, 526; 6 Sup. Ct., 475; 29 L. Ed., 715) lend strong support to this view.

Voelker case.

In the Voelker case, cited herein, recently decided by the circuit court of appeals, Judge Van Devanter writing the opinion, the following was stated:

> We think there was evidence that the carriage or movement of the coal with which the car in question was loaded had not terminated, and that the coal was still actually in transit. *The evidence contains no suggestion that the car had reached the end of its journey, or that it was to remain indefinitely or for any considerable time on the track where it was at the time of the injury, or that the coal was to be unloaded there* (our italics). The inference to be reasonably drawn from the evidence is that the car was then about to actively continue the journey toward the ultimate destination of the coal which it was carrying. Whether that was near by or remote is not material, because the shipment had originated in another State and was already impressed with the character of interstate traffic which would follow it at least until the actual transit ceased.

The second paragraph of the complaint in the case at bar, on page 2 of the transcript of record herein, states "that said engine at the said time (was) being used in moving interstate traffic, * * * and to couple said engine on to a certain dining car, also used in moving interstate traffic, which was standing at the

time above mentioned in the yards of the said company (Southern Pacific) in the said town of Promontory." Voelker case.

Inasmuch as Judge Sanborn and Judge Thayer did not dissent from the opinion in the Voelker case, in which they as well as Judge Van Devanter sat, and participated in the rendition of judgment, it is a fair inference that they concurred in what is virtually a reversal of that part of the Johnson case which holds as a matter of law that the dining car "Del Monte" was not engaged in interstate commerce, and upholds our contention that at all events this was not a question of law for the court:

> * * * It moved no traffic on its way. How could it be said to have been "used in moving interstate traffic" either while it was standing on the sidetrack or while it was going to and returning from the turntable?

It is no part of this brief to go into what may be called a question for the jury, but the judgment of the court below should be reversed because it did not submit this and other questions of fact to the jury. In other words, What was the dining car being used for? In the *Parsons case* (*supra*) the court said, "The crucial question is, Whether they are ships or vessels within the meaning of the admiralty law?"

> In fact, neither size, form, equipment, nor means of propulsion are determinative factors upon the question of jurisdiction, which regards only the purpose for which the craft was constructed and the business in which it is engaged.

In the Parsons (Canal Boat) case the owner set forth a claim under section 563 of the Revised Statutes, but no more directly nor distinctly than does the complaint in the Johnson case set forth the reliance upon the Federal safety-appliance act. Would not a parity of reason incline this court to declare either that the dining car Del Monte had such a character as an interstate car as to fall within the protection of the safety-appliance act, as a question of law, or else that the withdrawal of this question from the jury was so vital and so determinative of the entire character of the action with its decision adversely to Johnson that it resulted in a fatal error requiring a reversal of the judgment?

Interstate character of dining car.

The evidence in regard to the dining car shows that it had been used regularly for some five years in a regular run from San Francisco to Ogden—from California to Utah. Compare this with the canal boat, used in navigation on the Erie Canal, down the Hudson to Jersey City. Is the character of the equipment to govern, or is the past use to govern?

The car was generally used in interstate traffic, and until the defendant disproves this continuing use, the presumption is that it would continue to do so. Plaintiff's uncontradicted testimony at least established this point.

In other words, the determinative factor upon the question of jurisdiction, to quote the language of the court in the canal-boat case, is one which regards only the purpose for which the craft was constructed and the business in which it is engaged.

As was said in The Old Natchez, 9 Fed., 476:

> The liability depends upon the use then being made or intended to be made of the vessel or other article and not upon the mere fact that it is at the time afloat.

Interstate character of dining car.

Dining cars are generally used to feed passengers on through-going trains. Through-going trains usually carry passengers who come from without the State into and through the State. Can it be doubted that the dining car Del Monte was, in the case at bar, turned for any other purpose than for the express object of being more accessible to the persons whom they expected to use it on the west-bound train and was therefore in the act of serving the purpose of an interstate commerce character?

The circuit court of appeals states: "Is the turning of a vacant car which its owner intends to use at some future time in moving interstate traffic any part of commerce among the States?" "Does the intention of the owner as to a future use of an implement of transportation affect the character of the act of turning this car?" The answer to this question may, we submit, be found in the opinion of this court in the Canal Boat case. In that case although the canal boat was high and dry within the body of a county of New York State, yet although the court admitted that an admiralty court had no jurisdiction over a dry dock it still retained jurisdiction over the vessel. It might well have been said in that case as in this: "If after the car was turned (after the boat was repaired) it had

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changed its intention and concluded that it would not use it to move interstate traffic (not use the boat for navigation), would such change of purpose have affected its interstate character?"

Again the circuit court of appeals states:

> It is only when a car is "used in moving interstate traffic" that it becomes unlawful to haul it unless it is equipped as the statute prescribes. On the day of this accident the dining car in this case was standing empty on the sidetrack; the defendant drew it to a turntable, turned it, and placed it back upon the sidetrack. The accident occurred during the performance of this act. The car was vacant when it went to the turntable and vacant when it returned. It moved no traffic on its way. How could it be said to have been "used in moving interstate traffic" either while it was standing on the sidetrack or while it was going to and returning from the turntable? If the defendant had drawn it vacant over every foot of its railroad, it would not have been engaged in moving interstate traffic, and it would not have fallen under the ban of the statute. How can it thus fall because it was moved in the same way over a small portion of the road?

The key of this part of the opinion lies in the words, "*It moved no traffic on its way.*" There is no evidence to show that the dining car was completely empty. The object of a dining car is not to handle freight or transport groceries in bulk, etc., from one State to another, but to feed people; to make through travel

on passenger trains a possibility, and to relieve the carrier of the necessity of halting at eating houses or restaurants and indulging in other methods of frittering away the time.

The circuit court of appeals misapprehends the law when it appears to put the dining car which had been left at Promontory under the circumstances stated at various points in this brief in the same class with logs which had been floated down the river in the case of *Coe* v. *Errol* (116 U. S., 517) Coe v. Errol.

The opinion and decision of the Supreme Court in that case does not bear out the analogy which the circuit court of appeals relies on.

Although the Supreme Court held that the logs which had been left at Errol were not subjects of interstate commerce until "They were committed to the carrier for transportation out of the State to the State of destination, or have started on their ultimate passage to that State," and the fact that the owners intended to export them could not change the situation because the owners might change their intention.

The logs in the Errol case were as much a part of the wealth of the township of Errol and subject to police protection and to whatever benefits there might be obtainable in the village as other property. Let it be noted that the Supreme Court gives two alternatives as the criterion, either that they were committed to the common carrier for transportation or that they had started on their ultimate passage to that State—neither of these tests are relevant in this inquiry.

If there is any difference between a dining car, about to be used to feed passengers on a return interstate trip, and hence to be turned, and logs left high and dry from one season to another to be floated down when the new freshets supply the water, it is not difficult to see that error was committed by the supreme court of appeals of Virginia in *Norfolk and W. R. Co.* v. *Com.* (24 S. E., 838; 34 L. R. A., 105; 57 Am. St. Rep., 827).

The decision of Coe against Errol is founded upon taxation only and consequently has nothing to do with the general regulation of commerce. The great case in which the law was laid down as to the distinction between internal commerce which is subject to the control of the States, called *intrastate* commerce, and commerce among the States may be found in the case of *Daniel Ball* against *United States* (10 Wallace, 557). See also *Pensacola Tel. Co.* v. *W. U. Tel. Co.* (96 U. S., 9); *Gibbons* v. *Ogden* (9 Wheat., 1).

It would be futile to undertake in this brief to review all of the cases decided by this court in which the question has been considered as to when articles become impressed with the character of interstate traffic and when they cease to be so impressed, with all of the incidents thereto, for the reason that in the recent case of *Kelly* v. *Rhoads* (188 U. S., 1) Mr. Justice Brown sums up the criteria which are used to settle such questions when he says:

> Bearing in mind that the weight of all the previous cases in this court has been laid upon the fact of an indefinite delay, awaiting trans-

portation at the commencement of the journey, or awaiting sale or delivery at its termination, the facts in this case fail completely to bring it within those authorities.

Was car empty?

This car was not awaiting transportation at the commencement of its journey. How could it be called the commencement of the journey at all, when it is considered that Promontory is nothing but a station from which no train could possibly start, where the dining car could, under no circumstances, be equipped, and it was only put there as part of its journey from San Francisco to Ogden and return? It is just as clear that it was not the termination of its journey, nor was it an indefinite suspension of the journey; on the contrary, the suspension was definite to the most accurate degree possible, and was temporary in character, and it is well said that no temporary stoppage of interstate traffic will deprive the goods or vehicle of its interstate character.

Delaware & Hudson Canal Co. v. *Pennsylvania*, 1 L. R. A., 232.

When it is remembered that by R. S. sec. 3964, 17 Stat., 308, section 201, all railroads in the United States are by law post roads and that the power of Congress over commerce and post roads is absolute and complete and its source of power is clear, it follows that the prohibition by Congress for "any carrier engaged in interstate commerce by railroad, to haul or to permit to be hauled or used on its line (that includes every form of siding), any car used in moving interstate traffic not equipped with couplers coupling automatically

by impact" is clear. Had Congress intended that dining cars were to be exempt from the statute it would have said "any car" except dining cars or cars used for dining, or some apt words to express the meaning of the legislature. The fact of the matter is, the statute uses the words "any car," which includes a dining car, because it is one of the species or particular, whose genus is "any car."

Was dining car empty?

As far as inferences go, what authority did the court below have for determining as a question of law that the dining car Del Monte was empty? It had come to Utah from California and was going back from Utah to California. The direct contrary inference is not only permissible, but unavoidable, when the uncontradicted sworn testimony is recalled, which gives the reason for turning the dining car.

There is not a scintilla of evidence to show that the dining car Del Monte can be classed with—"Empty cars in repair shops in yards, on side-tracks," which the circuit court of appeals tries to use as an analogy for holding that this dining car Del Monte was empty in that sense. The question whether it was empty or not is, as soon as stated, seen to be a question of fact. The court has made it a question of law. It is certainly material to the question of the recovery of the judgment in this case, and should, therefore, not have been decided by the court as a question of law.

The reasoning of the court in treating the Del Monte as an empty car virtually makes switching a process to which the safety-appliance act does not apply.

The circuit court of appeals states its opinion on this point in the following words:

> But vacant cars which are not and may never be so used can not be held to come within the fair import of the terms of this law either because their owner intends to use them for that purpose at some future time or because they have been or will be so used. Empty cars in repair shops, in yards, on side tracks, those in use to transport traffic within a State, and for that purpose alone, are not in use to move articles of interstate commerce, and do not fall under the ban of this law. Neither the empty dining car standing upon the side track nor the freight engine which was used to turn it at the little station in Utah was then used in moving interstate traffic, within the meaning of this statute, and this case did not fall within the provisions of this law.

This embodies a most dangerous doctrine. *It virtually says that switching or turning a car, unless it is full of passengers or freight, is a process not protected by the safety-appliance act.* The vice of this doctrine seems to proceed as follows: Switching is an operation entirely conducted within one State, unless the yard is situated upon the boundary of two States. There can, consequently, be nothing of an interstate character in moving interstate traffic in a yard, and therefore no car that is being switched within a yard heretofore described need have couplers—"that fall under the ban of this law," as Sanborn, J., refers to this remedial and salutary statute.

Switching.

Switching. Yet it must be recalled that the safety-appliance act was passed "to compel common carriers engaged in interstate commerce to equip their cars with" couplers that couple automatically by impact; it did not state that switching was to be an operation exempted from the purview of the statute, and therefore under well-known rules of construction the operation of switching must have been in contemplation of law covered by the words of the act. It was to make the operation of switching safe, because that was the place in which men's arms and limbs and lives had been sacrificed. On the rails the only chance in which defective couplers might injure the operation of railroading had been the parting of a link and on heavy grades the coming together of two parts of a train at unequal speeds. In other words, if they ran away. But the appalling totals of killed and maimed had been occasioned in the main in this very operation of switching, when men were required to go between the cars and use a link and pin.

Practically the only time when these couplers must be in good repair is when switching operations are about to be carried out. Did those who drafted the statute suppose that when the command was laid upon all carriers engaged in interstate commerce by railroad not to haul or permit to be hauled or used on its line any car *used in interstate traffic*, that they would have a separate equipment of couplers, coupling automatically by impact when they carried interstate traffic, and a different set of couplers when they were

engaged in commerce that originated within a State and did not leave that State, or when the cars were being switched or handled preparatory thereto by a carrier engaged in interstate commerce by railroad? The mere statement of the proposition demonstrates its absurdity.

THESE WERE QUESTIONS OF FACT FOR THE JURY.

Questions of fact.

The use of the Miller hook with the Janney coupler, because it greatly increased the danger, was negligence. (*Russell* v. *Ry. Co.*, 32 Minn., 230, 233, 20 N. W., 147; *Hungerford* v. *Ry. Co.*, 41 Minn., 444, 43 N. W., 324; *Ry. Co.* v. *Garrett*, 73 Tex., 262, 13 S. W., 62, 15 Am. St. Rep., 781; *Martin* v. *Ry. Co.*, 94 Cal., 326, 329, 29 Pac., 645; *Southern Pac. Co.* v. *Burke*, 9 C. C. A., 229, 60 Fed., 704; *Smith* v. *Ry. Co.*, 72 Hun., 545, 25 N. Y. Supp., 638. See also *Northern Pacific Ry. Co.* v. *Tynan*, Fed. Rep., vol. 119, p. 288. Also *Greenlee* v. *Southern Ry. Co.*, 122 N. C., 977–982, 30 S. E., 115; 41 L. R. A., 399; *Troxler* v. *Southern Ry. Co.*, 124 N. C, 191; 32 S. E., 550; 44 L. R. A., 313.)

The title of the act plainly states that its purpose is "to *promote* the safety of employees and travelers upon railroads." At the time of its passage the coupler most universally in use was the link and pin, and it was to improve upon the conditions then existing as a result of the use of such coupler, that is "to *promote* the safety of employees," that Congress passed this act. Now, since it is an undisputed fact that it is more difficult and more dangerous to couple an M. C. B. coupler to

Questions of fact.

a Miller hook, which was the kind of a coupling attempted to be made by Johnson, than it is to couple together two of the old link-and-pin type, can it be contended that a condition which requires the making of such a coupling is "*promoting* the safety of employees upon railroads?" Indeed, it can be truthfully said that such a condition *increases the danger* rather than *promotes* the safety of employees?

It being clear that the use of the Miller hook with the Janney coupler was in and of itself an act of negligence, we contend that the trial court had several questions of fact before it on the evidence which should have been submitted to the jury for its determination.

If the application or nonapplication of the act of Congress depended upon the condition of the dining car, then it seems to us it would be a question of fact whether such dining car was empty at the time of the accident, and, whether empty or not, whether it was used in interstate commerce or not, subject, of course, to proper instructions as to the law by the court.

So, too, the question as to whether the engine or its tender was a car in the meaning of the act, subject, of course, to proper instructions as to the law.

Also whether the engine was used in interstate traffic.

The constitutional right of the citizen to have the facts of his case tried by a jury must not be encroached on by the courts under any pretext. As was said by Lord Hardwicke, "It is of the greatest consequence to the law of England and to the subject that these powers of the judge and jury be kept distinct; and that the

judge determine the law and the jury the fact, and if ever they come to be confounded it will prove the confusion and disruption of the law of England." (*Rex* v. *Poole*, *Cas. temp.*, Hardwicke, 28.) And to show what the law of the case is, we have ventured to reprint at length some excerpts from opinions hereon. Duty of master.

In *Mather* v. *Rillston* (156 U. S., 391) the court says:

> Occupations, however important, which can not be conducted without necessary danger to life, body, or limb, should not be prosecuted at all without all reasonable precautions against such dangers afforded by science. The *necessary danger attending them should operate as a prohibition to their pursuit without such safeguards.* Indeed, we think it may be laid down as a legal principle that in all occupations which are attended with great and unusual danger there must be used *all appliances readily attainable*, known to science, for the prevention of accidents, *and that the neglect to provide such readily attainable appliances will be regarded as proof of culpable negligence.*

In *Texas and P. Ry. Co.* v. *Carlin* (111 F. R., p. 778–779) the following was said on the question of negligence:

> But it is not the province of the court to weigh the evidence, and decide between conflicting statements of witnesses, or to decide what inference should be drawn from uncontradicted evidence, if different minds could fairly come to different conclusions from it. A question of negligence, dependent on evidence, should not be taken from the jury, except in

Standard of are.

cases where there is no material conflict and where there is no room for different minds to draw different inferences from it. The question of negligence is one of law for the court, only when the facts are such that all reasonable men must draw the same conclusions from them. A case should not be withdrawn from the jury unless the conclusion follows as matter of law that no recovery can be had upon any view that can be properly taken of the facts the evidence tends to establish.

Dissenting opinion in *Kilpatrick* v. *Choctaw, O. & G. R. Co.* (121 F. R., p. 16) (Caldwell, J.):

> It is not at all likely that the judges of that court would attempt to determine the question either as engineering experts or from practical experience as brakemen and switchmen. Judges not being qualified to speak either as engineering experts or from actual observation and practical experience, it is difficult to understand upon what principle they can declare that railroad companies are not required, for the protection of their employees, to block their guard rails and frogs, or resort to some equivalent or better device to protect their employees from the known and obvious dangers of open guard rails and frogs.
>
> * * * * *
>
> Our reason revolts and our humanity is shocked at the judicial declaration that railroad companies are not required to do anything in that direction, not even so much as to use, in the language of Judge Taft, "a well-known safety device."

Questions of fact.

It should be left to the jury, upon a consideration of all the evidence, to say whether the railroad company is guilty of culpable negligence in neglecting to provide, in the language of the Supreme Court, "such readily attainable appliances" as would lessen or prevent the danger. Juries, upon a consideration of the evidence, are much more capable of deciding this question than judges, and besides, it is a question of fact which belongs to the domain of juries to decide. If in the beginning, instead of leaving these questions to the jury, where they rightfully belong, judges had taken it upon themselves to decide that railroad companies were not required to do this or that thing for the safety of their employees or passengers, or were not required to operate their trains in this manner or that manner for a like purpose, there would to-day be small safety either for employees or passengers. *It is mainly to the verdicts of juries we owe most of the improvements in appliances and methods of operating railroads which have lessened the dangers to their employees and passengers.*

Whenever it is made to appear to a railroad company that it costs more to pay the damages assessed against it by the verdicts of juries for maintaining a dangerous condition of its track or appliances than it would cost to substitute safe ones in their place, the substitution is quickly made. But as long as courts hold as matter of law that what the witnesses in this case declare to be "simply a death trap" may be maintained with impunity and without incurring any pecuniary liability, the death trap will remain and

the slaughter go on. *The decision of the majority of the court makes human life in this circuit a cheaper commodity than lumber.*

Questions of fact.

Ordinarily there is a question, What are reasonably safe appliances? These certainly are questions of fact, which in this case were never passed on by the jury. In this case, however, the statute, after a delay of more than seven years, definitely prescribed, not the make or type or kind of appliances, but ordered that "It shall be unlawful for any such common carrier to haul or permit to be hauled or used on its lines any car not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

The question whether the Southern Pacific Company fulfilled this duty—this positive duty—is certainly a question of fact. Was the dining car Del Monte equipped as the safety-appliance act required it to be equipped on August 1, 1900?

We respectfully urge on the attention of this court the requirements of the safety-appliance act. The Miller hook was an appliance that was antiquated and would never couple automatically by impact with a Janney or M. C. B. type of coupler, which was an appliance readily attainable at a cost of about $18.

The jury should have passed on the question of the reasonableness of using a Miller hook on a dining car used in interstate commerce in August, 1900, when it was bound to come in contact with an M. C. B. coupler—

the usual form of coupler. Was it a reasonably safe appliance? Did it comply with the safety appliance act?

Has the Southern Pacific Company, the master, fulfilled its duty—a duty it could not delegate, one imposed by statute and by common law—of furnishing its servants with appliances that are readily attainable and safe, in respect to any one of the questions of equipment of the dining car raised by the above? Duty of master.

These questions were not permitted to be passed on by the jury, and it is submitted that each omission was an error.

There is no law requiring the master to take off a Miller hook and put on a M. C. B. type of coupler, *but it is the law that a car furnished by the master shall be reasonably safe to handle.* And under the safety-appliance act it is and was the law that couplers must couple automatically by impact. Whether that requirement of the statute could only be observed by using a coupler of the M. C. B. type is certainly a direct question of fact material to the determination of the issues in the case, and should have been submitted to the jury. The mere fact of its being a debatable question of fact, about which reasonable men can in good faith differ, as is shown by the fact that the brief submitted by the Southern Pacific Company questions this very statement, shows that a question of fact was involved applicable and relating to the most material

Duty of master.

points of the evidence, namely, the negligence of the defendant company, which under the law should have been submitted to the jury.

It is a question of fact whether the car was or was not reasonably safe to handle in view of the development of the art on August 1, 1900. As was said in *Grattis* v. *Kansas City P. & G. R. Co.* (48 L. R. A., 408): "The master is not bound to furnish the safest and best appliances that could be used. He is acquit of fault if what he furnishes is reasonably safe and suitable." What are or what are not reasonably safe appliances are plain questions of fact which should have been submitted to the jury, and the circuit court of appeals erred in not directing that this should have been done, and it certainly erred fatally in affirming a judgment that had withdrawn the case from the jury on the question of defendant's negligence.

The decision of the circuit court of appeals, in effect although not in words, makes the law of the case that Johnson assumed the risk incident to the defective coupler; but section 8 of the safety-appliance act distinctly states:

> That any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provisions of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge.

During the debates in Congress, particularly in the Senate, on the Safety-appliance Act the distinction between contributory negligence and assumption of risk was clearly defined. (Vol. 24, Congressional Record, 52d Congress, 2d session).

Ordinarily the courts do not permit research to be made into the motives of the legislators or debates preceding enactments of statutes by Congress, but the opinion in the case of the *Holy Trinity Church* against *The United States* (143 U. S., 457) shows that this is permissible where there is an obscurity or misunderstanding.

In *Greenlee* v. *Southern Railway Company* (122 N. C., 977), Judge Clark says:

> Contributory negligence of a brakeman in coupling cars will not preclude a recovery for injury caused by the absence of self-couplers, which constituted continuing negligence of the master and existed subsequently to his negligence.

Questions of fact.

The questions of fact that we contend should have been submitted to the jury can be multiplied ad infinitum. The reasoning of the learned circuit court of appeals shows what questions of fact should have been submitted to the jury. Its reasoning shows how necessary they were to its decision, and how impossible it was for it to have reached its conclusions without a thorough examination of its various chains of facts and circumstances. Now the very fact that there was a dissenting opinion in the circuit court of

Questions of fact.

appeals by Judge Thayer on the question of fact of the interstate character of the dining car, shows that there was more than one question of fact undetermined. Judge Thayer's objection is stated in these words:

> I am also of opinion that, within the fair intent and import of the act, the dining car in question at the time of the accident was being hauled or used in interstate traffic. The reasoning by which a contrary conclusion is reached seems to me to be altogether too refined and unsatisfactory to be of any practical value. It was a car which at the time was employed in no other service than to furnish meals to passengers between Ogden and San Francisco. It had not been taken out of that service, even for repairs or for any other use, when the accident occurred, but was engaged therein to the same extent that it would have been if it had been hauled through to Ogden, and if the accident had there occurred while it was being turned to make the return trip to San Francisco. The cars composing a train which is regularly employed in interstate traffic ought to be regarded as used in that traffic while the train is being made up with a view to an immediate departure on an interstate journey as well as after the journey has actually begun. I accordingly dissent from the conclusion of the majority of the court on this point.

The fact that of three judges of a circuit court of appeals one differs from the majority on what they contend is a material portion of its contention certainly presents a case where all reasonable men do not draw

the same conclusions from the same facts, and therefore a question of law for the court is not presented. (*R. R.* v. *Ives*, 144 U. S., 409.) Question of fact.

Had the court below not committed error, the questions for the jury, it is submitted, would fall in the following categories: First. Those relating to the equipment of the dining car Del Monte. Was it equipped with a safe and proper appliance to be used by the Southern Pacific Company? Should a car so equipped have been used after the safety-appliance act went into effect? Was it not a violation of the safety-appliance act to "*use a car*" that would not "*couple automatically by impact*" with anything with which they undertook to couple it, and was Johnson's injury the result of a violation of the company's duty as prescribed by Congress—in other words, the consequence of the company's violation of its statutory duty? That is all there is to this case.

The circuit court of appeals erred when it did not reverse the judgment below, and when it held that the operation of switching a car not arrived at its destination was not an operation of interstate commerce.

What warrant had the circuit court of appeals in holding as a matter of law that the Del Monte was an empty car, and not engaged in interstate commerce? The testimony of Rowland, the train dispatcher at Ogden (print, p. 21), shows that the Del Monte was ordered to be turned at Promontory, "So as to have the kitchen in the rear instead of in the front" when this diner went back to San Francisco.

The train dispatcher testified (print, p. 24–21) "the dining-car conductor requested it to be turned around; his idea in having it turned was so as to leave the main entrance next to the train."

There is nothing to show that besides the dining-car conductor this dining car did not have its complement of steward, cooks, and waiters, all preparing the meal for the next trainload of westbound interstate passengers for California.

Character of dining car.

And there is the more reason for this since that is the precise reason why the dining car Del Monte was dropped and was left at Promontory. In the opinion of the circuit court of appeals the interstate character of the dining car is an important issue. Constantly the court says the dining car was empty and not engaged in interstate commerce, and yet the second part of the syllogism is based on the deductions drawn from the assumption that that car was empty. That conclusion is drawn from a fact, and is based on what is believed to be a fact, and there is no reason why that fact should be determined by the court when it is so debatable. It should, on the contrary, have been submitted to the jury—the constitutional triers of questions of fact. The evidence contains no suggestion that the Del Monte was to be left permanently at Promontory, or that Promontory was its destination. On the contrary, every reasonable circumstance points to the one conclusion that, had it not been for its intended further use as

dining car to follow the west-going passengers on the Southern Pacific trains that day, no reason for turning the diner would have existed and no accident would have taken place. Whether the dining car was or was not empty was a question of fact. Even should it be held the application of the conclusion or answer to this question of fact is a question of law, that the dining car was engaged in interstate traffic was certainly a question for the jury, and the circuit court of appeals should have so ordered.

The dining car as a matter of law had its interstate character impressed on it when it came from San Francisco. Johnson's freight train had its interstate commerce character as firmly implanted on it from its run from the west. Neither freight train nor dining car had lost the impress or character of interstate traffic as a question of law, and whether the dining car had lost it or had not lost it, was at all events a most material, debatable question and a question of fact; therefore, being material, it should have been submitted to the jury. That this is not an unfair contention may be seen from the opinion of this same circuit court of appeals (Thayer and Sanborn concurring) in the case of *C. M. & St. P. Ry. Co.* v. *Voelker*, 129 Fed. Rep., 522, 528, in which a jury had passed on the question of fact deducible from the killing of a brakeman by reason of defective safety appliances. The court said in part: Voelker case.

> We think there was evidence that the carriage or movement of the coal with which the

Voelker case.

car in question was loaded had not terminated, and that the coal was still actually in transit. *The evidence contains no suggestion that the car had reached the end of its journey, or that it was to remain indefinitely or for any considerable time on the track* where it was at the time *of the injury, or that the coal was to be* UNLOADED THERE. The inference to be reasonably drawn from the evidence is that the car was then *about to actively continue the journey toward the ultimate destination of the coal which it was carrying.* Whether that was near by or remote is not material, because the shipment had originated in another State and was already impressed with the character of interstate traffic, which would follow it at least until the actual transit ceased.

Defendant was clearly shown to be a common carrier engaged in interstate commerce by railroad, and to be using the car mentioned on its line of railroad in moving interstate traffic, and therefore the branch of the case relating to the condition of the coupler IS controlled by the act of Congress and not by the State statute.

CONTRIBUTORY NEGLIGENCE.

Contributory negligence.

In respondent's brief in the circuit court of appeals a large part thereof is devoted to insisting that the plaintiff was guilty of contributory negligence. Neither the circuit court nor the circuit court of appeals paid any attention to this question, and we feel that it is almost unnecessary for us to do so; but, in order that there may be no misunderstanding on the subject, we wish to call the court's attention to the facts in this

case as showing conclusively that there is no question of contributory negligence involved. Contributory negligence.

The act which Johnson was doing was, as he testified, a thing that he had been required to do hundreds of times before, *and up to the first day of August, as is recognized by the statute, he was compelled to do so at his own risk. There was no other way to couple automatic couplers with link and pin couplers, or automatic couplers of one type with those of another type, except to go between the cars to do it.* This was what swelled the casualties to trainmen, and for more than seven long years after the passage of the law to promote their safety these men, of whom Johnson was a type, uncomplainingly subjected themselves to this danger, with men constantly dropping out of their ranks killed and maimed at the rate of 1 out of every 324 killed and 1 out of 12 injured of those employed in this service of coupling. (See Appendix.)

The law after its passage continued this burden upon them for a period of five years. Without protest they submitted to an extension of two years, and a further extension of seven months, for the railroads—their employers—to do away with the condition which forced them to go between the cars, always looking forward to the time when they should be relieved from this risk. At last relief came and the law was in force; the immunity which the employer had previously enjoyed was done away with. The liability was shifted from the shoulders of the employees to those of their employers.

Johnson was asked on the stand, with relation to the company's rule No. 59: "You knew that was there and promised to obey it?"

A. "Yes, sir; those were the rules handed me by the defendant company." (Record, p. .17)

Rules.

Of course, he knew the rule, which if observed would have stopped the wheels of commerce all over the land, and which was necessarily disobeyed thousands of times a day all over this vast transcontinental system. But mark what he said, voicing what he and every one of his fellow trainmen knew, "*I was not forced to go in any more than that I knew the consequences if I did not do the work I was told to do.*" (Record, p. 15.) Nor was this condition singular to Johnson. It was the general requirement of all railroad men in the United States that they should couple cars together by means of a link and pin, and, as we have previously shown in this brief, the danger attached to the use of the ordinary link and pin had been increased by requiring trainmen to couple cars together, which were equipped with the so-called automatic coupler, by means of a link and pin where the type of couplers was not the same. This requirement was so common and so universally complied with that it certainly can not be said that by undertaking to make such a coupling Johnson was doing something which an ordinarily prudent man would quit the service rather than do. As we understand the law, that is the test of contributory negligence; it is the attempt by a person to do some act which an ordinarily prudent man would refuse to do.

There is no suggestion in the testimony that Johnson did the coupling in any careless or reckless manner; on the contrary, he testified that he undertook to do it in exactly the same way that he had always done it before. So that there is nothing about either the act itself, or the method in which he undertook to perform it, which would justify any court in saying that Johnson was guilty of contributory negligence. It is said that the act was dangerous, that Johnson testified it was dangerous, and that he knew it was dangerous. That is true. Of course, it was dangerous to go between the cars, that is why the act of Congress was passed. But that does not create a condition authorizing the court to say that Johnson was guilty of contributory negligence in undertaking to do it. Every man who goes upon a train of cars knows that he is going into danger when he does so, but he can not be said to be guilty of contributory negligence because he does so. As was stated in the Voelker case, heretofore cited, the road had no right to create a condition which compelled a man to put his body between the cars.

Risk shifted by safety appliance act.

Nor can it be said that he violated the rules of the company by going in there. The rules had to be violated by somebody or the business of the company in that particular case would have been left undone. And besides it was the company that instructed him to violate the rules. In Utah the conductor of a train is the company. (Utah R. S., 1342 and 1343.)

Utah statute.

§ 1342. All persons engaged in the service of any person, firm, or corporation, foreign or

Utah statute.

domestic, doing business in this State, who are intrusted by such person, firm, or corporation as employer with the authority of superintendence, control, or command of other persons in the employ or service of such employer, or with the authority to direct any other employee in the performance of any duties of such employee, are vice principals of such employer and are not fellow servants.

SEC. 1343. All persons who are engaged in the service of such employer, and who, while so engaged, are in the same grade of service and are working together at the same time and place and to a common purpose, neither of such persons being entrusted by such employer with any superintendence or control over his fellow employees, are fellow servants with each other: *Provided*, That nothing herein contained shall be so construed as to make the employees of such employer fellow servants with other employees engaged in any other department of service of such employer. Employees who do not come within the provisions of this section shall not be considered fellow servants.

And it was by the conductor's orders that he went in to couple these cars together.

It is admitted by the answer that it was the act of the company.

This is not contributory negligence.

Carson v. *So. R. R.* (46 S. E., 525).

The judgment below should be reversed, with an order for trial *de novo*, and the safety appliance act reinstated by this court.

Respectfully submitted.

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Attorneys for Petitioner.

Reference is made to the Third, Fourteenth, Fifteenth, and Sixteenth Annual Reports of the Interstate Commerce Commission; for the year 1889, page 294, etc.; for the year 1900, page 76, etc.; for the year 1901, page 62, etc.; and for the year 1902, page 57, etc.

Also to the statistical reports of the statistics of the Interstate Commerce Commission, years 1890 to 1903, inclusive.

Also to reports of National Association of State Railroad Commissioners:

Resolution requiring M. C. B. couplers. (Proceedings 1890, p. 65.)

Resolution requiring all cars used in interstate commerce to be supplied with automatic couplers and air brakes after January 1, 1893. (Proceedings 1890, p. 67.)

Resolution appointing committee of five to urge upon Congress the imperative need of action calculated to hasten and insure the equipment of freight cars throughout the country with uniform automatic couplers and air brakes. (Proceedings 1891, p. 126.)

Resolution appointing a committee of five to draft a bill to be submitted to Congress requiring train brakes and uniform automatic couplers on freight cars and driving-wheel brakes on locomotives. (Proceedings 1891, p. 129.)

Discussion as to the need of uniformity and interchangeability in couplers. (Proceedings 1891, pp. 130–146.)

Report of committee on safety appliances, with proposed bills requiring uniform couplers and train brakes. (Proceedings 1892, pp. 150–180.)

Resolution directing committee on safety appliances to urge upon Congress the immediate passage of such bill as may most effectually insure the equipment of freight cars throughout the country with uniform automatic couplers and train brakes, and the equipment of locomotives with driving-wheel brakes. (Proceedings 1892, p. 178.)

Resolution appointing committee to investigate types, devices, and methods for coupling, and report such facts and recommendations as they may deem proper and conducive to a universal adoption and use of a uniform type of coupler. (Proceedings 1893, pp. 26–40.)

Report of committee on safety appliances. (Proceedings 1893, p. 20.)

Remarks on safety appliances. (Proceedings 1894, pp. 60–61.)

Remarks on safety appliances. (Proceedings 1895, p. 20.)

Discussion on safety appliances. (Proceedings 1896, p. 89.)

APPENDIX.

Statement showing number of trainmen(a) killed and injured on account of coupling and uncoupling cars.

[Compiled by the statistician of the Interstate Commerce Commission.]

Year ending June 30—	Number of trainmen on June 30.	Killed.	Injured.
1890	153,235	265	6,078
1891	160,138	288	7,155
1892	169,260	253	7,766
1893	179,636	310	8,758
1894	160,083	181	5,539
1895	157,731	189	6,077
1896	162,876	157	6,457
1897	161,397	147	4,698
1898	170,708	182	5,280
1899	178,851	180	5,055
1900	191,198	188	3,803
1901	209,043	163	2,377
1902	225,422	141	2,475
1903	253,660	211	3,023

a Enginemen, firemen, conductors, and other trainmen.

Statement showing ratio of casualties with respect to trainmen on account of coupling and uncoupling cars.

Year ending June 30—	Number of trainmen (excepting enginemen and firemen) on June 30.	Number of trainmen employed (excepting enginemen and firemen) to one trainman—	
		Killed.	Injured.
1890	85,247	322	14
1891	89,060	309	12
1892	94,774	375	12
1893	100,496	324	12
1894	88,240	488	16
1895	87,497	463	14
1896	90,263	575	14
1897	88,935	605	19
1898	93,844	516	18
1899	97,729	543	19
1900	104,231	554	27
1901	116,585	715	49
1902	126,458	897	51
1903	144,626	685	48

Comparative summary of railway accidents for the years ending June 30, 1903, to 1890.

Year.	Employees.		Passengers.		Other persons.		Total.	
	Killed.	Injured.	Killed.	Injured.	Killed.	Injured.	Killed.	Injured.
1903	3,606	60,481	355	8,231	5,879	7,841	9,840	76,553
1902	2,969	50,524	345	6,683	5,274	7,455	8,588	64,662
1901	2,675	41,142	282	4,988	5,498	7,209	8,455	53,339
1900	2,550	39,643	249	4,128	5,066	6,549	7,865	50,320
1899	2,210	34,923	239	3,442	4,674	6,255	7,123	44,620
1898	1,958	31,761	221	2,945	4,680	6,176	6,859	40,882
1897	1,693	27,667	222	2,795	4,522	6,269	6,437	36,731
1896	1,861	29,969	181	2,873	4,406	5,845	6,448	38,687
1895	1,811	25,696	170	2,375	4,155	5,677	6,136	33,748
1894	1,823	23,422	324	3,034	4,300	5,433	6,447	31,889
1893	2,727	31,729	299	3,229	4,320	5,435	7,346	40,393
1892	2,554	28,267	376	3,227	4,217	5,158	7,147	36,652
1891	2,660	26,140	293	2,972	4,076	4,769	7,029	33,881
1890	2,451	22,396	286	2,425	3,598	4,206	6,335	29,027

Statement of conditions in 1893 and 1902.

	1893.	1902.	Increase 1902 over 1893.
Number of cars in freight service	1,013,307	1,546,101	532,794
Number of locomotives in freight service	18,599	23,594	4,995
Number of tons carried	745,119,482	1,200,315,787	455,196,305
Number of tons carried 1 mile	93,588,111,833	157,289,370,053	63,701,258,220
Average number of tons in train	184	296	112
Number of trainmen employed (other than enginemen and firemen), including switchmen, flagmen, and watchmen	146,544	176,942	30,398
Number of tons carried for each trainman employed, etc	5,085	6,784	1,699
Number of tons carried 1 mile for each trainman employed, etc	638,635	888,932	250,297
Number of freight cars for each trainman employed, etc	7	9	2
Number of train miles run for each trainman employed, etc	5,764	5,291	a 473
Number of enginemen and firemen employed	79,140	98,969	19,829
Number of switchmen, flagmen, and watchmen employed	46,048	50,489	4,441
Number of trainmen employed in coupling and uncoupling cars for each one killed (other than enginemen and firemen), including switchmen, flagmen, and watchmen	349	1,060	711
Number of trainmen employed in coupling and uncoupling cars for each one injured (other than enginemen and firemen), including switchmen, flagmen, and watchmen	13	62	49
Number of trainmen killed in coupling and uncoupling cars (other than enginemen and firemen), including switchmen, flagmen, and watchmen, for each 1,000 employed	3	1	a 2
Number of trainmen injured in coupling and uncoupling cars (other than enginemen and firemen), including switchmen, flagmen, and watchmen, for each 1,000 employed	77	16	a 61

a Decrease.

The *above* figures relating to accidents only deal with those occurring in coupling and uncoupling cars.

ACCIDENTS TO TRAINMEN, DUE TO FALLING FROM TRAINS AND ENGINES, FOR THE YEAR ENDING JUNE 30, 1893.

Killed	507
Injured	2,984

Accidents to trainmen due to falling from trains, locomotives, or cars:

Killed	371
Injured	3,821

Jumping on or off trains, locomotives, or cars:

Killed	78
Injured	2,681

for the YEAR ENDING JUNE 30, 1902.

Accidents to trainmen due to falling from trains, locomotives, or cars:

Killed	440
Injured	4,191

Jumping on or off trains, locomotives, or cars:

Killed	101
Injured	3,133

for the YEAR ENDING JUNE 30, 1903.

Statement of equipment in service and equipment fitted with automatic couplers, compiled from the annual reports of the Southern Pacific Company for the years named, ending June 30.

1892.

Item.	Total number at end of year.	Fitted with automatic coupler.	
		Number.	Name.
Locomotives	938	.....	
Cars:			
In passenger service	1,130	1,122	Miller.
In freight service	22,526	147	Miller.
In company's service	752	2	Miller.
Total cars in service	24,408	1,271	

1897.

Locomotives	831	.....	
Cars:			
In passenger service	1,074	1,068	Miller.
In freight service	17,412	10,212	137 Miller, 1,995 Janney, 7,985 California, 95 California and Janney.
In company's service	699	19	16 Miller, 3 California.
Total cars in service	19,185	11,299	

1898.

Locomotives	815	.....	
Cars:			
In passenger service	1,076	1,058	737 Miller hook, 5 Buhoup, 314 Miller.
In freight service	17,160	12,717	1,911 Janney, 8,206 Miller and California, 2,505 California, 95 California and Janney.
In company's service	836	135	25 Miller, 102 Janney, 8 California.
Total cars in service	19,072	13,910	

1899.

Locomotives	865	381	352 California, 29 Janney.
Cars:			
In passenger service	1,113	1,098	54 Janney-Miller, 49 National, 8 B. & B. swing head, 2 California, 6 Buhaup, 980 Miller hook.
In freight service	19,346	17,300	43 Miller hook, 2,708 Janney, 1,869 Lone Star, 2 Delaware, 12,678 California.
In company's service	1,066	440	233 Janney, 10 Miller hook, 197 California.
Total cars in service	21,525	18,838	

Statement of equipment in service and equipment fitted with automatic couplers, compiled from the annual reports of the Southern Pacific Company for the years named, ending June 30—Continued.

1900.

Item.	Total number at end of year.	Fitted with automatic coupler.	
		Number.	Name.
Locomotives	851	723	649 California, 74 Janney.
Cars:			
In passenger service	993	973	8 B. & B. swing head, 5 California, 7 Janney, 7 Janney-Buhoup, 60 Janney-Miller, 770 Miller hook, 114 National, 2 S. P. Co. interchangeable.
In freight service	22,285	21,407	2 Delaware, 13,316 California, 3,148 Janney, 4,679 Lone Star, 37 Miller hook, 225 no record (leased cars).
In company's service	1,299	885	318 California, 480 Janney, 59 Lone Star, 21 Miller hook, 4 Janney-Miller, 3 National.
Total cars in service	24,577	23,265	

SAFETY APPLIANCE ACTS.

Laws of 1893 with amendments.
Laws of 1903.

An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes. (Public No. 113, approved March 2, 1893, amended April 1, 1896.)

Driving-wheel and train brakes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.

Automatic couplers.

SEC. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

When carriers may lawfully refuse to receive cars from connecting lines or shippers.

SEC. 3. That when any person, firm, company, or corporation engaged in interstate commerce by railroad shall have equipped a sufficient number of its cars so as to comply with the provisions of section one of this act, it may lawfully refuse to receive from connecting lines of road or shippers any cars not equipped sufficiently, in accordance with the first section of this act, with such power or train brakes as will work and readily interchange with the brakes in use on its own cars, required by this act.

Grab irons and handholds.

SEC. 4. That from and after the first day of July, eighteen hundred and ninety-five, until otherwise ordered by the Interstate Commerce Commission, and it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars.

Standard height of drawbars for freight cars.

SEC. 5. That within ninety days from the passage of this act the American Railway Association is authorized hereby to designate to the Interstate Commerce Commission the standard height of drawbars for freight cars, measured perpendicular from the level of the tops of the rails to the centers of the drawbars, for each of the several gauges of railroads in use in the United States, and shall fix a maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars. Upon their determination being certified to the Interstate Commerce Commission, said commission shall at once give notice of the standard fixed upon to all common carriers, owners, or lessees engaged in interstate commerce in the United States by such means as the commission may deem proper. But should said association fail to determine a standard as above provided, it shall be the duty of the Interstate Commerce Commission to do so, before July first, eighteen hundred and ninety-four, and immediately to give notice thereof as aforesaid. And after July first, eighteen hundred and ninety-five, no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard above provided for.

Penalty for violation of the provisions of this act.

SEC. 6. (*As amended April 1, 1896.*) That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge: *Provided*, That nothing in this act contained shall shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs.

Duty of United States district attorney.

Duty of Interstate Commerce Commission.

Exceptions to the act.

Power of Interstate Commerce Commission to extend time of carriers to comply with this act.

SEC. 7. That the Interstate Commerce Commission may from time to time upon full hearing and for good cause extend the period within which any common carrier shall comply with the provisions of this act.

Employees not deemed to assume risk of employment.

SEC. 8. That any employee of any such common carrier who may be injured by any locomotive, car, or train in use in contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge.

NOTE.—Prescribed standard height of drawbars: Standard-gauge roads, 34½ inches; narrow-guage roads, 26 inches; maximum variation between loaded and empty cars, 3 inches.

An Act to amend an act entitled "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving-wheel brakes, and for other purposes," approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six. (Public No. 133, approved March 2, 1903.)

Safety appliance act of Mar. 2, 1893, as amended by act of Apr. 1, 1896, shall apply in Territories and District of Columbia.

Provisions of safety appliance acts as to couplers shall apply in all cases when couplers are brought together.

Safety appliance act shall apply to all equipment of any railroad engaged in interstate commerce.

Exceptions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions and requirements of the Act entitled "An Act to promote the safety of employees and traverlers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes," approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six, shall be held to apply to common carriers by railroads in the Territories and the District of Columbia and shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type, and the provisions and requirements hereof and of said Acts relating to train brakes, automatic couplers, grab irons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith, excepting those trains, cars, and locomotives exempted by the provisions of section six of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, or which are use upon street railways.

Power or train brakes on not less than 50 per cent of cars in trains shall be used and operated.

SEC. 2. That whenever, as provided in said Act, any train is operated with power or train brakes, not less than fifty per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said fifty per centum shall have their brakes so used and operated; and, to more fully carry into effect the ob-

Commission may increase minimum percentage of power or train-brake cars to be used.
Penalty for violating this section.

jects of said Act, the Interstate Commerce Commission may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as aforesaid; and failure to comply with any such requirement of the said Interstate Commerce Commission shall be subject to the like penalty as failure to comply with any requirement of this section.

Act effective Sept. 1, 1903.
Provisions, powers, duties, requirements, and liabilities specified in act of Mar. 2, 1893, and act of Apr. 1, 1896, apply to this act.

SEC. 3. That the provisions of this Act shall not take effect until September first, nineteen hundred and three. Nothing in this Act shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any United States district attorney from any of the provisions, powers, duties, liabilities, or requirements of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six; and all of the provisions, powers, duties, requirements and liabilities of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, shall, except as specifically amended by this Act, apply to this Act.

Copies of these Acts will be furnished upon application.

EDW. A. MOSELEY,
Secretary Interstate Commerce Commission.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

W. O. JOHNSON, PETITIONER,
v.
SOUTHERN PACIFIC COMPANY. } No. 32.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

W. O. JOHNSON, PLAINTIFF IN ERROR,
v.
SOUTHERN PACIFIC COMPANY. } No. 87.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF ON BEHALF OF THE UNITED STATES.

FILED BY LEAVE OF COURT.

This was an action brought by petitioner to recover damages for injuries received while employed as a brakeman by the defendant company. The suit was first instituted in the district court of the first judicial district of the State of Utah, and thence removed to the circuit court of the United States for the district of Utah. (Rec., No. 32, pp. 4–7.)

8781—04——1

The facts, which are more fully set forth in the petition for certiorari and in the brief of counsel for petitioner, are briefly these:

On August 5, 1900, petitioner was acting as head brakeman on a freight train of the Southern Pacific Company, which was making its regular trip between San Francisco, Cal., and Ogden, Utah. Upon reaching the town of Promontory, in Utah, petitioner was directed to uncouple the engine from the train and couple it to a dining car which was standing on a side track, for the purpose of turning the car around preparatory to its being picked up and put on the next westbound passenger train (pp. 2–3, 8, 13, 21). The engine and dining car being equipped, respectively, with the Janney coupler and the Miller hook, which would not couple together automatically by impact (pp. 3, 14-15, 21), it was necessary for petitioner to go between the engine and car to accomplish the coupling, and in so doing his hand was caught between the engine bumper and the dining-car bumper and crushed, thereby necessitating amputation of the hand above the wrist (pp. 3, 8, 14).

Upon the trial of the case in the United States circuit court, the motion of the defendant company to instruct the jury to return a verdict in its favor was sustained, and the jury were so instructed and judgment entered accordingly (pp. 12, 27–28).

Petitioner sued out a writ of error from the circuit court of appeals for the eighth circuit, which court affirmed the judgment of the court below (pp. 34–46).

This case involves the act of Congress approved

March 2, 1893 (27 Stat., 531), entitled "An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes."

The United States, deeming the questions at issue of great gravity and importance, as affecting not only the construction of the safety-appliance acts, but the general control of interstate commerce by Congress, asks to be heard thereon.

The case is here both on certiorari and writ of error. The Government presents no argument on the question of jurisdiction, nor is it necessary to decide which route was correct. The case is now properly before the court by either one method or the other, and the court will therefore proceed to determine it on the merits. (*Pullman Car Co.* v. *Transportation Co.*, 171 U. S., 138, 145.)

ARGUMENT.

I.

A LOCOMOTIVE OR A TENDER IS A CAR WITHIN THE MEANING OF SECTION 2 OF THE ACT.

The plaintiff justly claimed that he was relieved of any assumption of risk under common-law rules by the act of 1893, which provides:

> SEC. 1. That from and after the first day of January, 1898, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive

> engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system. * * *.
>
> SEC. 2. That on and after the first day of January, 1898, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

Section 6 imposes a penalty of $100 for each violation of any of the provisions of the act.

Section 8 provides:

> That any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge.

The circuit court of appeals held that the statute is not applicable to the present case, in view of the fact that both engine and car were equipped as required by the act, the one with a power driving wheel brake and the other with a coupler; that the prohibition of section 2 refers only to cars, and does not apply to locomotives; and that in any event the engine in question, as well as the car, was furnished with an automatic coupler, so that each was equipped as directed by the

statute, and the defendant accordingly was not guilty of a violation of the law by their use.

Such a construction, it is submitted, would utterly defeat the plain intent and purpose of the law. The learned judge holds that because Congress has provided specifically in section 1 for the equipment of *locomotives* with brakes, and in section 2 requires *cars* to be equipped with automatic couplers, therefore the equipment of engines with couplers is not contemplated.

This is not a case for the application of the rule that the expression of one is the exclusion of the other. In the interpretation of this act we must look to the intention of Congress (*United States* v. *Wiltberger*, 5 Wheat., 76; *Wilkinson* v. *Leland*, 2 Pet., 627); and the meaning of Congress may be extended beyond the precise words used in the law, according to the end in view or the purpose which was designed (*United States* v. *Freeman*, 3 How., 556). The intention of Congress here, as expressed in the title of the act of 1893, was "to promote the safety of employees," etc.; in requiring the use of couplers coupling automatically by impact the object was to obviate as much as possible the danger and risk to life and limb consequent upon the old link-and-pin system. It is thus difficult to perceive how Congress could have intended to exempt locomotives from the requirement of section 2. It is as necessary for the safety of employees that engines should be provided with automatic couplers as it is that cars should be so equipped. The coupling together of engines and cars has to be done as frequently

as the coupling of cars with other cars; and the risk would appear to be as great, if not greater.

In *Fleming* v. *Southern Ry. Co.* (131 N. C., 476) the court stated that it was as essential that the same kind of device in the way of a coupler should be attached to an engine as is attached to a car, the end and aim of the law being the protection as far as possible of the lives and limbs of persons in railroad employment; and accordingly it was held that the failure to equip a locomotive with an automatic coupler is negligence as much as a failure so to equip a car.

It is submitted that the word "car" is used in its generic sense in the act, and that locomotives and tenders are properly included within its meaning. Besides dictionary definitions, there are numerous decisions supporting this view.

In *Winkler* v. *Philadelphia and Reading Ry. Co.* (53 Atl., 90, 4 Pennewill Dela. Rep., p. 80) it was held that the tender of a locomotive engine engaged in interstate commerce is a car within the scope of the safety-appliance act.

The language of the Delaware court in charging the jury was:

> We may say to you that the tender of a locomotive engine engaged in interstate traffic is a car within the scope of the act of Congress which uses the general terms "locomotive," "car," or "train." A tender is defined to be a car by Webster. A tender is not a locomotive engine or component part thereof, but is the small car carrying water and fuel for the engine

> and to which the first passenger or freight car of the train is coupled. This interpretation comes not only within the language of the act of Congress, but it is especially within its scope, which is to promote the safety of employees and travelers upon railroads. (53 Atl. Rep., 90.)

This charge was affirmed by the supreme court of Delaware. (4 Pennewill Reports, p. 387.)

In the case of *East St. Louis Connecting Ry. Co.* v. *O'Hara* (150 Ill., 580) it was held that a city ordinance providing that no railroad company shall run any passenger train or cars within the city limits at a greater rate of speed than 10 miles an hour, nor any freight train or cars at a greater rate of speed than 6 miles an hour, was broad enough to include locomotive engines. The court said (p. 587):

> The purpose of the ordinance was to prevent injury to persons and property from the running of trains and cars at too high a rate of speed within the city, and locomotive engines come clearly within the reason and purpose of the ordinance, as much when running alone as when attached to and propelling a train of cars. Besides, the term "cars" in its proper signification includes many, if not all, classes of vehicles on wheels, and we see no reason why, in its proper generic sense, it may not be held to embrace locomotive engines as a species of cars.

In *Kansas City, Memphis and Birmingham R. R. Co.* v. *Crocker* (9 Ala., 412) it was held that a hand car was within the spirit and terms of a statute giving an action against the employer for injuries suffered by an

employee by reason of the negligence of any person in the service who had charge of "any signal points, locomotive, engine, switch, *car*, or train upon a railway." It was argued that as the word "car" was used in connection with the words "locomotive," "engine," and "train," it was intended to mean a vehicle used on a railway which is propelled by a locomotive or engine and forms part of a train. But the court said (pp. 421, 422):

> It is not difficult to select from the several definitions of the word "car" as found in the dictionaries one which is applicable to the word as used in the statute. The Century Dictionary gives this, among other definitions, "a vehicle running upon rails." One of Webster's definitions is, "a vehicle adapted to the rails of a railroad." We find nothing in the language of the statute to suggest that the word as there used was intended to convey a meaning which excludes the idea of a hand or lever car.

The decision in *Thomas* v. *Georgia R. R. and Banking Co.* (38 Ga., 222) is to the same effect. There the court remarked that "it is not very apparent to this court why an injury may not be done to the person and property of individuals by the careless and negligent running of 'hand-cars' by the defendant upon the road, as well as by the running of other cars propelled by steam."

So, in the present case, it is not apparent why injuries may not be suffered by reason of a failure to equip locomotives or tenders with automatic couplers, as well as by their omission in the case of cars.

In *New York* v. *Third Ave. Ry. Co.* (117 N. Y., 404, 646) the court said:

> Neither the word "coach," "stage," nor "car" can be said to * * * have any legal or fixed meaning distinguishing one from the other, or any one of them from several other terms implying a vehicle or conveyance.

It may be remarked that by the act of March 2, 1903 (32 Stat., 943), Congress put an end to all doubt on the subject by expressly providing that the provisions of the act of 1893 relating to automatic couplers, etc., "shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce." This supplement to the law should not be viewed as excluding the broad generic construction of "car" in the original act, but merely as plainly declaratory thereof. We cite authorities on this point, *infra*.

The court below held further that even if the word "car" in section 2 embraced locomotive in its meaning, yet that there had been no violation of the act, because both the locomotive and the dining car were equipped, in fact, with automatic couplers, and therefore the terms of the law were fully complied with. In other words, the conclusion of the learned judge is that so long as each car is actually furnished with an automatic coupler the law is satisfied, and the fact that the couplers are of different types and will not couple together automatically is of no consequence.

This holding completely disregards the spirit of the statute. It is not even in accord with the letter, and

would, if allowed to stand, render the law of no effect whatever. The court says:

> The prohibition of the statute goes no further than to bar the handling of a car "not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars." It does not bar the handling and use of a car which will couple automatically with the couplers of its kind because it will not also couple automatically with couplers of all kinds, and it would be an unwarrantable extension of the terms of this law to import into it a provision to this effect.

The court's construction of the clause quoted entirely overlooks the words which govern the clause and furnish the test of compliance with the requirement. What the act really forbids is the hauling or use of *any cars that can not be coupled together automatically by impact by means of the couplers actually used on the cars to be coupled.* It is not the mere equipment with couplers that is required, but their ability to couple with each other, not with other couplers not used; and the object of the requirement, clearly expressed, is the protection of the lives and limbs of railroad employees by rendering it unnecessary for a man operating the couplers to go between the ends of the cars, which he would have to do where automatic couplers of different kinds were used, just as much as if not more than he was compelled to do with the old method of link and pin.

Whatever the kind or condition of the couplers on

the tender and car, respectively, the necessary use of the link and pin destroyed their value and was a violation of the law.

In *Winkler* v. *P. & R. R. R. Co.* (*ut supra*) the court charged the jury as follows:

> Should you find that the tender at the time of the accident was equipped with automatic couplers, but that it was so connected with the "bull-nose" coupler that the coupling with other cars was not made automatically by impact, but so equipped that it made it necessary for men to go between the ends of the cars to couple and uncouple, then such coupling did not comply with the act of Congress, and was unlawful. * * * The law manifestly contemplates that the car shall be so equipped that the coupling shall actually be made automatically. (Affirmed by the supreme court of Delaware, 4 Pennewill Reports, p. 387.)

That the words "without the necessity of men going between the ends of the cars" are the test of compliance with the requirement of section 2 was pointed out by the court in the case of *Chicago, Milwaukee and St. Paul Ry. Co.* v. *Voelker* (129 Fed. Rep., 522). In that case the cars were equipped with couplers of the same type, which would ordinarily couple together by impact; but it was claimed that when the accident occurred they were defective and out of repair, which made it necessary for the person attempting the coupling to interpose his person between the ends of the cars. The court held that if this was the true condition of the coupler at the time of the injury, it did not

satisfy the statute, and its use was violative thereof and constituted actionable negligence.

The amendment of 1903 (*supra*) set at rest also the question whether the couplers actually meeting must couple automatically, whatever the respective types, by providing that the act of 1893 "shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type."

II.

THE SCOPE AND PURPOSE OF THE ACT.

But in reference both to the contents of the term "car" and the scope of the requirement—"couplers coupling automatically by impact," etc., under section 2 of the act of 1893, the true view is, not that the amendment of 1903 changed and enlarged the previous law, but that it simply declared the true meaning and placed the intention and effect beyond peradventure. We contend that the law, under the act of 1893, has always been what the amendment, passed to accomplish other objects as well (secs. 2, 3), now renders specific, certain, and beyond cavil. (See authorities cited *infra*.)

This contention requires an examination of the circumstances surrounding the enactment of the law.

The loss of life and the injuries due to link-and-pin couplings and hand brakes were notorious and appalling. Statistics showed, as stated in the Senate report (*infra*) that in eight years the casualties to employees on the railroad lines of the country would equal in

number all of the men in the service at any given time, and of these a large percentage was chargeable to couplings and brakes. President Harrison, in his annual message for 1889, called the attention of Congress to the subject in earnest language, saying, among other things—

> It is competent, I think, for Congress to require uniformity in the construction of cars used in interstate commerce and the use of improved safety appliances upon such trains. Time will be necessary to make the needed changes, but an earnest and intelligent beginning should be made at once. It is a reproach to our civilization that any class of American workmen should, in the pursuit of a necessary and useful vocation, be subjected to a peril of life and limb as great as that of a soldier in time of war.

The President emphatically renewed his recommendations in 1890, 1891, and 1892, urging Congress to act without further delay.

We quote as follows from the annual messages for the years referred to:

> The chief difficulty in the way is to secure agreement as to the best appliances—simplicity, effectiveness, and cost being considered. This difficulty will only yield to legislation, which should be based upon full inquiry and impartial tests. The purpose should be to secure the cooperation of all well-disposed managers and owners, but the fearful fact that every year's delay involves the sacrifice of 2,000 lives and the maiming of 20,000 young men should plead

both with Congress and the managers against any needless delay. (Message for 1890.)

I have twice before urgently called the attention of Congress to the necessity of legislation for the protection of the lives of railroad employees, but nothing has yet been done. During the year ending June 30, 1890, 369 brakemen were killed and 7,841 maimed while engaged in coupling cars. The total number of railroad employees killed during the year was 2,451 and the number injured 22,390. This is a cruel and largely needless sacrifice. The Government is spending nearly $1,000,000 annually to save the lives of shipwrecked seamen. Every steam vessel is rigidly inspected and required to adopt the most approved safety appliances. All this is good, but how shall we excuse the lack of interest and effort in behalf of this army of brave young men who in our land commerce are being sacrificed every year by the continued use of antiquated and dangerous appliances? A law requiring of every railroad engaged in interstate commerce the equipment each year of a given per cent of its freight cars with automatic couplers and air brakes would compel an agreement between the roads as to the kind of brakes and couplers to be used, and would very soon and very greatly reduce the present fearful death rate among railroad employees. (Message for 1891.)

In renewing the recommendation which I have made in three preceding annual messages, that Congress should legislate for the protection of railroad employees against the dangers incident to the old and inadequate methods of

> breaking and coupling which are stilll in use upon freight trains, I do so with the hope that this Congress may take action upon the subject. Statistics furnished by the Interstate Commerce Commission show that during the year ending June 30, 1891, there were forty-seven different styles of car couplers reported to be in use, and that during the same period there were 2,660 employees killed and 26,140 injured. Nearly 16 per cent of the deaths occurred in the coupling and uncoupling of cars, and over 36 per cent of the injuries had the same origin. (Message for 1892.)

The House report on the subject (No. 1678, Fifty-second Congress, first session) set out the facts—the numerous and increasing casualties due to coupling, the universal demand of employees for protection, and the strong public opinion appealing to Congress for legislation. The report proceeded:

> It is the judgment of this committee that all cars and locomotives should be equipped with automatic couplers obviating the necessity of the men going between the cars. * * * The efficiency of such devices, provided that all cars and locomotives be furnished with a uniform type of coupler and brake, is generally admitted. Without uniformity, the danger to employees is fully as great as with the old link-and-pin coupler and hand brake, and representatives of the switchmen and trainmen who appeared before the committee stated that unless there could be uniformity they would prefer to go back entirely to the old link and

> pin; that the danger had increased from the use of so many different types, which statement seems corroborated by the large increase in casualties appearing in the statistics of 1890 over those of 1889.

The report referred to the desire on the part of many railroad managers to equip with safety appliances both from the dictates of humanity and in the interest of economical management; but that in order to bring about uniformity, the unaided efforts of the railroads was not sufficient; the aid of law was required in order to compel many of the railroads to conform to the demand; that the States were unable to provide a remedy, and—

> To obtain uniformity in couplers we must invoke the law of the United States to provide a method of securing the adoption of some standard type and if need be to compel its use.

In discussing the five fundamentally important provisions of the bill recommended (which now appear in the law), the report contained the following paragraph on automatic couplers:

> The committee recognize that it is a serious question whether the best type of coupler has yet been devised, but they believe that if the railroads of the country are compelled to act and reasonable time is given them to come together, the result will be the adoption of some uniform, interchangeable type of coupler, and also train brake, that will prove satisfactory to them and will accomplish the result desired.

The report concluded with some comparisons and statistics offered "to rivet the public mind on the appalling list of casualties and bring home to all men the frightful loss of life."

The Senate report (No. 1049 of the same session) goes over the same ground, and emphasizes the same facts.

> It is proved by the statistics that the total loss in killed and injured in eight years is equal to the total number of men engaged in this service at any one time. * * * The necessity of national legislation looking towards uniformity in railway safety appliances is apparent since it is admittedly a subject with which the various States can not successfully cope. Their incompetency to meet the situation is illustrated by the fact that the legislatures of Massachusetts, Iowa, Mississippi, Nebraska, Minnesota, New York, Ohio, Michigan, Wisconsin, and of other States, realizing their own inability to afford an adequate remedy, have called upon Congress to act. * * * The freight car of Massachusetts, loaded with the products of that State, may in three weeks reach California, passing from ocean to ocean; or the car of an Illinois road may pass through three or four States in a less number of days on its journey from the Lakes to the Gulf. Either of them may have the coupler sanctioned by the State from which it started, but from its lack of interchangeability with the couplers of those cars with which it must be coupled to perform its mission of transporting the commerce of the

country, it produces death and destruction in every freight yard it enters.

The report referred to the fact that delegates of the Massachusetts legislature had formally presented legislative resolutions on this subject under instructions from that body, and that the committee had heard also representatives of the organizations of the railway employees; that—

> These representative men, speaking for thousands of their associates, say that what they desire is uniformity, and that the danger of their calling has increased rather than diminished by the introduction of different types of couplers; that it would be far better to return to the old link and pin than to have so many kinds and styles of couplers in use. * * * The efforts of many of the railroads to increase the safety of their employees have, by the mere lack of uniformity and interchangeability of couplers, added to the difficulty.

The report noted that thirty-seven different styles of couplers were used; that there were others still in the experimental stage, and that there were seven thousand patented safety appliances.

> What the railroad employees need to secure uniform safety in the performance of their duties is uniformity. They want all couplers alike and perfectly interchangeable. Under existing conditions it is impossible to tell before going between the cars whether the employee will find the ordinary link and pin to couple together or two different varieties of the improved couplers now in use.

The committee stated that they were impressed with the desirability of leaving the railroads to work out the problem without legislation, but could not be unmindful of the necessities of the situation and the increasing dangers to which employees are subjected on account of lack of united action on the part of the roads. And, referring to a national convention of railroad commissioners and the differences existing among them as to the proper remedy, the report continues:

> While such variance of opinion exists to a greater or less extent, they are all agreed that legislation which allows each road to put on any automatic coupler its judgment dictates will not meet the requirements and will simply increase the evil.

Upon the hearings before the Senate committee much diversity of opinion appeared among the representatives of the various interests—railways and employees. The chief points of conflict were whether any law at all was necessary; whether the railways on the showing of progress then made might not properly be left wholly free to work out to completion the problem of couplings; whether a law should prescribe any particular coupling device, or even any specific type; whether the selection of a particular device should be left to a commission, or whether the law should lay down a principle and give the roads time to conform, as was ultimately done. It was earnestly urged by some representatives of the railways, and also of the employees, although this position was as earnestly challenged, that the Master Car Builders' Association,

in their expert and representative capacity, had already evolved a type and principle of coupler, including many varieties, which were readily interchangeable and uniform in the sense of the controlling principle and the practical demand; that whether this type, the "M. C. B.," was adopted *eo nomine* by the law, as some of its advocates preferred, or was described in principle so that, as was believed, the law of the survival of the fittest would ultimately lead to its exclusive adoption, as other advocates urged, that type was the best and was either free from patents on the controlling principle or such patents had been surrendered by their owners for the common benefit of the public, the railroads, and the employees.

However this may be, and whether or not subsequent time and later improvements have justified the claims on behalf of the M. C. B. type (with which the tender here was equipped) as easily interchangeable among its different varieties, which appears to be generally conceded, it is certain that all through this preliminary investigation no one doubted the terrible prevalence and increase of fatalities due to couplings and the immediate necessity of a remedy. No one doubted that the very gist of the evil was that many couplers used were not uniform in any sense, and that a certain uniformity was essential so that all devices used would interchange practically. This characteristic difficulty in the case was fully and plainly placed before Congress, and in the light of all the facts bearing on it they legislated so as not to foster

any monopoly, so as not to adopt any particular device or even any type, but provided a principle which comprehensively embraced the evil, leaving the details to be worked out with a certain elasticity by the railroads themselves, and giving them ample time within which to do it. That controlling and certain principle was an automatic coupling by impact, so as not to require men to go between the cars. Consequently, when the tender equipped with an M. C. B. and the car with the Miller hook came together in Johnson's case it made no difference which, if either, was modern and adequate or which was antiquated and dangerous. They would not work together; Johnson was required to go between the cars to effect a coupling, and the law was violated.

It is proper to refer to public documents, including reports to Congress and hearings before committees, in order to show the public exigencies of a situation, the well-known facts upon which the law was intended to operate, and the policy underlying the law. It has been frequently held, indeed, that, as bearing upon the construction of an act of Congress, the courts are not at liberty to recur to the views expressed by individual members in debate. (*Aldridge* v. *Williams*, 3 How., 9, 24; *United States* v. *Union Pacific R. R. Co.*, 91 U. S., 72, 79; *Maxwell* v. *Dow*, 176 U. S., 581, 601; *Knowlton* v. *Moore*, 178 U. S., 41, 72.) But the courts will take judicial notice of contemporaneous events and the history of the times when the act was passed, in order to be informed of the situation as it existed

and was pressed upon the attention of Congress (*Smith* v. *Townsend*, 148 U. S., 494; *United States* v. *Laws*, 163 U. S., 258, 262; *United States* v. *Trans-Missouri Freight Association*, 166 U. S., 290, 318); and for this purpose it is clearly allowable to refer to the reports of committees and even to the debates in Congress. (*American Net and Twine Co.* v. *Worthington*, 141 U. S., 468, 473, 474; *Holy Trinity Church* v. *United States*, 143 U. S., 457, 463; *Dunlap* v. *United States*, 173 U. S., 65, 75; *Downes* v. *Bidwell*, 182 U. S., 244, 253, 255.)

For the convenience of the court we submit, as an appendix to this brief, the House and Senate reports referred to, and call attention particularly to testimony of the following witnesses at the Senate hearing: Mr. Rodgers, a former railroad commissioner of New York (pp. 7–15); Mr. Moseley, secretary of the Interstate Commerce Commission (p. 17); Mr. Crocker, a former railroad commissioner of Massachusetts (p. 30); Mr. Ely, of the Pennsylvania Railroad (pp. 17, 19, 22); Mr. Haines, representing the American Railway Association (pp. 37–49); Mr. J. A. Lakin, representing the employees (p. 55); Mr. Frank P. Sargent, representing the Brotherhood of Locomotive Firemen, now the Commissioner-General of Immigration (p. 62); Mr. John Downey, representing the switchmen (p. 67); Mr. John H. King, a former railroad commissioner of South Dakota (pp. 70–78); Mr. L. S. Coffin, representing the Brotherhood of Railroad Trainmen (pp. 78–89).

Within the principle of judicial notice above stated,

it is legitimate to refer to changes made in a bill on the course of its passage through Congress. (*Dunlap* v. *United States*, 173 U. S., 65, 75.)

The Senate substitute for the bill as it came from the House (Cong. Rec., vol. 24, pt. 2, p. 1246) contained the following as the second section:

> That on and after the 1st day of January, 1898, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate commerce not equipped with couplers uniform in type and action, coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars. And said uniform automatic coupler shall always be of the standard type established by such common carriers controlling 75 per cent of the cars used in such traffic. Said common carriers shall report to the Interstate Commerce Commission within one year from the date of the passage of this act the standard type of automatic couplers so established, but on failure to do so the said Commission shall designate and publish properly the type of couplers to be used.

That is to say, it was proposed to adopt a specific kind of uniform automatic coupler as determined by the common carriers themselves under the supervision and control of the Interstate Commerce Commission. The debate turned largely upon the question whether or not Congress ought to do this or merely establish the principle of safety and permit the railroads to work

out the details as it was urged they were endeavoring to do. But it was abundantly evident all through the debates that the evils were fully understood and admitted, and the necessity of some remedy conceded, and the particular difficulty as to interchanges was entirely recognized.

Restricting the references to the debates to the report of the committee, and to various comments upon the facts elicited before them, Mr. Cullom, for instance, who had the bill in charge, said (Cong. Rec. *ut supra*, p. 1273):

> Then, as to the second section of the bill, that section has reference only to what are usually called automatic couplers. It was the intention and purpose of the committee, and I think it is carried out in the substitute, to simply require a uniform coupler, the testimony showing that such a coupler must be put in use by direction of the National Government in order to protect the lives of the people operating the trains, taking care of the cars, coupling them, etc.

The same Senator also said (pp. 1274–1275), referring to testimony before the committee, as read by the Senator from Colorado (Mr. Wolcott):

> It is true that there was more or less confusion or difference of judgment as expressed to the committee by the witnesses coming before us. For instance, Mr. Crocker, of Boston, who for a number of years was one of the railroad commissioners of Massachusetts, had a bill of a particular kind, and came before us advocating it. * * * Mr. King, I believe, representing a

> large labor organization * * * had a still different bill. * * * So the switchmen, the engineers, and the yardmen all came before us and some of them wanted one kind of legislation and some another. But all of them, I may say, wanted some legislation that would result in a uniform coupler. * * * Very few of them, if any, were willing to allow the situation to remain as it is, with one railroad putting on one kind of a coupler, another putting on another kind, and all of them going on at a slow pace. * * * The proposition was that if that situation was to continue, they would rather go back to the old principle of the link and pin.

Even Senators who were opposing the bill upon various grounds expressed themselves without dissent as in sympathy with any proper effort to lessen the number of casualties to travelers and employees upon the railroads.

Mr. Chandler (p. 1280), speaking in behalf of the employees, said:

> The railroad employees of the country want this system to be ended. They do not want any undue haste about it. They are entirely reasonable about it. This bill does not require any particular kind of coupler to be adopted by the railroads, except a coupler which can be coupled and uncoupled without requiring anybody to go between the cars. * * * Whatever the railroads of this country choose to adopt they are at liberty to adopt, but the bill is meant as notice to them, and that is about all the bill is, that they must not stand still, that they must go on in this direction.

That the precise difficulty as to interchangeability was before the legislators is further shown by the following question of Senator White (p. 1284):

> I should like at some time for my enlightenment, as he [Mr. Wolcott] goes on in his argument, if it does not disturb him, to notice one point. I find this difficulty in my mind: Taking all the statements which the distinguished Senator has made as accurate, how does that meet the difficulty that the railroads using their best endeavor at the present time, this best endeavor being used upon different roads, reach different conclusions upon different roads? Road A, using its best endeavor, reaches one conclusion and puts in one form of appliance; road B, using its best endeavor, puts in another form of appliance. If those two appliances, brought together, because of their want of uniformity beget fatality to human life, does the argument of best endeavor remove that difficulty?

We quote this extract with some hesitation and reserve, and conclude to do so because the distinguished Senator, now a Justice of this court, was not intimating an opinion on the meaning of the law, but was merely asking a brother Senator for information.

As the debate proceeded it was proposed by Mr. Palmer that the last portion of the second section as offered be stricken out, so that the section should read as follows:

> That on and after the 1st day of January, 1898, it shall be unlawful for any such common

carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers uniform in type and action, coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

Thereupon the following colloquy took place (id., p. 1332):

Mr. PALMER. If this bill imperatively requires that a system of coupling and uncoupling shall be adopted which acts automatically without the necessity of men going between cars, is not that the type itself required by law? The minor questions about the twenty-eight or twenty-nine different varieties of automatic coupling are wholly unimportant if the type is that which is described in the section I have just read. * * *

Mr. CULLOM. If my colleague will allow me to make a suggestion, I am inclined to think if those words were stricken out it would simply leave every railroad to have its own type of coupler, and there would not be that uniformity all over the country which we are seeking. That might be the result of striking out the latter part of the section.

Mr. PALMER. I may be allowed to say from my observation of couplers uniformity is desirable, and that there are a variety of couplers which may be safe; but on account of the ignorance of operatives their true office is misunderstood, and sometimes accidents happen. But if the law provides imperatively that the couplers

> shall be automatic and shall operate without the necessity of the manual interference of the individual brakeman, then the question of uniformity is entirely unimportant, as the coupler acts automatically without the aid of individuals.

Amendments having been offered (p. 1359) requirng the adoption of the general contour lines of the M.C.B. type, and requiring the condemnation of any such device if patented to public use, Mr. Chandler, expressing not his views as to the meaning of the law, but his belief upon the facts, said:

> I am confident in the belief that the vertical plane coupler can be adopted as the type; that the railroads of the country can make couplers of that type, and that not only will the cars of each railroad couple with each other by impact and without the necessity of anyone going between the cars, but the couplers of the various railroads engaged in interstate commerce will couple with each other without any difficulty whatever and without the necessity of the paying of a royalty by the railroad companies to any patentees unless they choose to pay them. That is the way I understand the subject.

On motion of Mr. Gray (pp. 1375–1376), the words "uniform in type and action" were stricken out, Senator Gray remarking:

> I think we shall have accomplished by the amendment all that we may legitimately seek to accomplish, and shall not impose upon the railroad companies a condition which may have no reference at all to the end we have in view. * * * For instance, suppose a railroad com-

> pany receives * * * a lot of cars from another road, and though they may have the automatic couplers coupled by impact, which will not make necessary the interposition of the body of the brakeman to couple, they should not be uniform, what do we care whether they are uniform or not if we accomplish the end that in the language of this bill under my amendment prescribes that they shall be automatic couplers, coupling by impact, and which shall not make necessary the interposition of the body of brakeman? Suppose a road, from caprice, from one of those antagonisms which come from the fierce competition for traffic, should refuse cars which come from another road, even though they may have an automatic coupler, one that will couple by impact, one that will not make necessary the interposition of the body of the brakeman, and say, "This train is not uniform in the character of the coupler in type or action, and therefore we refuse to receive it." I think that every extraneous and unnecessary condition should be eliminated from this bill, and that only those provisions should remain which are necessary to accomplish the great and humane end which this bill unquestionably has in view—that is, the protection of the life and limb of the brakemen on the railroads.

An amendment to strike out the words "coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars," was rejected (p. 1423), and in this form, that is, the form of the existing law, the bill finally

passed both Houses and was approved by the President.

We have thus reviewed the legislative history of the law in order to show plainly that the dilemma as to the interchanges of automatic couplers was clearly in the mind of Congress, and to enforce the argument that in the original law as passed ample provision was made to cover this difficulty and to compel the railroads, whatever particular devices they respectively adopted, to act with such degree of uniformity that the danger should be eliminated. The requirement of automatic coupling by impact without the necessity of men going between the cars fully secured this result, and railroads are without excuse if, after the ample time allowed them to conform to the law, couplings were presented to each other, as in the present case, which did not couple automatically by impact and which required a man to go between the cars.

It might be argued that the striking out of the phrase "uniform in type and action" shows that Congress did not intend to require the companies to adopt devices which would work together in all their foreign interchanges. This would, however, be the same as to say that Congress intended to adopt a law which was illusory and nugatory as a real remedy for a great and admitted evil. It is evident that that provision was stricken out merely to prevent a railroad company, hostile or capricious in its relations to connecting or rival lines, from rejecting interchanges because the couplings on foreign cars offered to them in the course

of business were not exactly uniform with the device which they had adopted. The purpose was not to weaken the protection to the public and the employees, but to protect the railroads against each other, and that purpose is plainly shown in the remarks of the Senator offering the amendment. The phrase was evidently regarded as practically compelling the adoption by all roads of some particular device—at least it was evidently considered that this might be viewed as its meaning and effect in the practical operation of the law. Striking out that phrase for the particular reasons apparent did not strike out of the law the principle of that degree of uniformity which would insure safety; and in leaving in the words now found in the law as to automatic coupling by impact, without the necessity of men going between the cars, the necessary principle and degree of uniformity was preserved. Plainly, it was supposed that if the phrase stricken out were preserved, some particular coupler might possibly be imposed which was undesirable, where the only essential thing was to preserve the principle and real object of the law, and leave the roads free from unnecessary compulsion at the instance of unfriendly and rival railroad interests.

This is evident also from Senator Palmer's remark (*supra*) "then the question of uniformity is entirely unimportant, as the coupler acts automatically without the aid of individuals." Plainly "uniformity" here and in Senator Gray's mind was deemed to require the same particular coupler on all roads, and the specific

reference might therefore properly be omitted without impairing the principle or effect of the law.

We therefore submit with confidence that section 2 of the act of 1893 clearly provided for an equipment which v as interchangeable under actual conditions and free from the risk and danger which Johnson had to run; and that the amendment of 1903 did not, as I have before urged, change or enlarge the law, but merely declared plainly what the original law meant. It was a legislative construction of a prior enactment.

There are authorities on this point.

In *United States* v. *Freeman* (3 How., 556) the court said:

> If it can be gathered from a subsequent statute *in pari materia* what meaning the legislature attached to the words of a former statute they will amount to legislative declaration of its meaning, and will govern the construction of the first statute. (*Morris* v. *Mellin*, 6 Barn. & Cress., 454) * * * A thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter.

In the case cited (*Morris* v. *Mellin*) the statute before the court for construction made certain provisions as to warrants of attorney of special kinds in relation to *bankrupts*, and then contained general language as to warrants of attorney. The question was whether or not this general language was intended to apply to *insolvent* debtors. Littledale, J., considering a subsequent statute, which recited that it was expedient to extend the provisions of the prior statute, enacted that

its provisions should extend to the prior act as much as if therein enacted, and extended the provisions of the prior act so as to apply to insolvent debtors, held that the passage of the second act, in extension of the first one, showed that the first act was not intended to apply to insolvents. It is to be noted that stress was laid upon the second act being in extension—upon the use of the word "extended."

In *Stockdale* v. *Insurance Co.* (20 Wall., 323) the acts before the court were those of June 30, 1864, as amended by act of March 2, 1867, providing that certain taxes should "be due and payable on or before the 30th day of April in each year until and including the year 1870, and no longer," and the act of July 14, 1870, providing that the foregoing act and amendatory act "shall be *construed* to impose the taxes therein mentioned to the 1st day of August, 1870." It was claimed that certain taxes were illegally assessed under the later act on the ground that Congress had usurped the judicial power in declaring that the former act should be *construed* in a certain way. The majority of the court did not regard the use of the word "construe" as controlling, but held that Congress had a right to extend the former law by a new enactment, and in effect had done so, saying, by Mr. Justice Miller (p. 331):

> Both in principle and authority it may be taken to be established that a legislative body may, by statute, declare the construction of previous statutes so as to bind the courts in

> reference to all transactions occurring after the passage of the law, and may in many cases thus furnish the rule to govern the courts in transactions which are past, provided no constitutional right of the party concerned is violated.

The above language was approved in *Koshkonong* v. *Burton* (104 U. S., 668, 679), where it appeared that a Wisconsin statute relative to bonds had received in that State a judicial construction that holders of the bonds were entitled to compound interest. A later law enacted that "it was and is the true intent" of the former act that compound interest should not be allowed. The court held that the later act could only operate upon future transactions, because to hold otherwise would be to impair the obligation of the contract into which a holder of a bond entered when he purchased it.

That case may be distinguished upon the ground that the prior act had been judicially construed before the passage of the later one. It does not decide that if the later act had been passed before the supreme court of Wisconsin construed the prior act the court would not have looked to the later act as a help in interpreting the former.

United States v. *Freeman* and *Stockdale* v. *Insurance Co.* (*ut supra*) were cited and approved in *Cope* v. *Cope* (137 U. S., 682), where the court had under consideration whether or not an act passed in 1862 repealed one passed in 1852. The point was determined by an examination of several statutes passed subsequent to 1862. The court, by Mr. Justice Brown, said (p. 688):

> These several acts of Congress, dealing as they do with the same subject-matter, should be construed not only as expressing the intention of Congress at the dates the several acts were passed, but the later acts should also be regarded as legislative interpretations of the prior ones.

In *Bailey* v. *Clark* (21 Wall., 284) the court was called upon to construe section 110 of the revenue act as amended by act of July 13, 1866, which provided that a tax should be levied "on the capital employed by any person in the business of banking," etc. Subsequently controversies arose as to the meaning of the words "capital employed," and in 1872 Congress enacted that those words "shall not include money borrowed or received from day to day in the usual course of business from any person not a partner of or interested in the said bank," etc. It was held that the words in the act of 1866 meant what they were said to mean in the act of 1872. As to the latter act, the court said (p. 288):

> This enactment was evidently intended to remove any doubt previously existing as to the meaning of the statute, and declare its true construction and meaning. Had it been intended to apply only to cases subsequently arising, it would undoubtedly have so provided in terms.

Applying the foregoing principles to the present case, the interpretation of the word "cars" and of the scope of the coupling requirement in the first act is a judicial and not a legislative function. Therefore, if

the court determine that the intention of Congress, in the use ot the word *cars*, be plain, admitting of but one construction, the subsequent legislation will be disregarded. But if the court be in doubt as to its meaning, the subsequent legislation will be examined; and under *Bailey* v. *Clark* it will hold that the purpose of the later act was to define the terms of the prior one in a manner favorable to the contention of the Government. And so as to the scope of the coupling requirements.

But without these authorities, which, we submit, sustain our contention, surely the mere fact that the later law was passed ought not to destroy the meaning of the original law, if, as an independent problem of construction, it is demonstrated that its scope and intention are broad enough to include this very case. And this, we contend, we have done above.

If, indeed, the law permits the condition of couplings shown here, as the court below thought, what becomes of its purpose in the light of the facts which demanded its passage, especially as to the greater danger of automatics not interchangeable as compared with the link and pin? Was it not entirely nugatory and ineffective? Was not the last state worse than the first, and did the law so far as couplings were concerned really accomplish anything "to promote the safety of employees and travelers upon railroads?"

Another indication that Congress, in the act of 1903, intended only to construe and declare the meaning of

the act of 1893, appears from the particular language used in the act of 1903. That act provided that the act of 1893, with its amendment of 1896, "*shall be held to apply* to common carriers by railroads in the Territories and the District of Columbia, and shall apply in all cases * * * and * * * *shall be held to apply* to all trains," etc. These words do not enlarge the law, but merely construe and apply it.

III.

THE ACT IS REMEDIAL AND SHOULD BE LIBERALLY CONSTRUED.

It is further submittted that this is not truly a penal act, and that the rule of strict interpretation in favor of the defendant should not govern in its construction.

It can not be doubted that the primary object of the safety-appliance act was to effect a public good. It is therefore a remedial statute, and should be construed liberally so as to carry out the intention of Congress and effectually accomplish its objects. The fact that a penalty is imposed for violation of its provisions does not make it a penal law; for while in one sense every act imposing a penalty or forfeiture may be called a penal law, yet, as in the present case, "such laws are often deemed and truly deserve to be called remedial." (*Taylor* v. *United States*, 3 How., 197; *Cliquot* v. *United States*, 3 Wall., 114; *United States* v. *Hodson*, 10 Wall., 395; *Smythe* v. *Fiske*, 23 Wall., 374; *United States* v. *Stowell*, 133 United States, 12.) Examples of such laws are found in those governing the

collection of customs, and in statutes for the prevention of frauds upon the revenue.

But even if the act should be conceded to be penal in a strict sense, inquiry into the intention of Congress is still proper and necessary (*The Enterprise*, 1 Paine, 32; Fed. Cas., 4499). The act should be interpreted according to the manifest import of the words, and the most restricted sense should not be adopted as the true sense of the statute unless it harmonizes with the legislative intent and accords with the mischiefs to be remedied. As was said in *United States* v. *Lacher* (134 U. S., 624):

> Though penal laws are to be construed strictly, yet the intention of the legislature must govern in the construction of penal as well as other statutes; and they are not to be construed so strictly as to defeat the obvious intention of the legislature.

See also to the same effect *United States* v. *Wiltberger*, 5 Wheat., 76; *American Fur Co.* v. *United States*, 2 Pet., 358; *United States* v. *Morris*, 14 Pet., 464; *United States* v. *Reese*, 92 U. S., 214; *United States* v. *Hartwell*, 6 Wall., 385.

In *United States* v. *Winn* (3 Sumn., 209), it was held that the word "crew," as used in a statute inflicting a penalty on "any master or other officer" of an American vessel who, without justifiable cause, should beat, wound, etc., any one or more of the *crew*, embraced all the officers as well as the common seamen. Mr. Justice Story, referring to the rule that penal statutes are to be construed strictly, said:

> I agree to the rule in its true and sober sense; and that is that penal statutes are not to be enlarged by implication, or extended to cases not obviously within their words and purport. But where the words are general and include various classes of persons, I know of no authority which would justify the court in restricting them to one class, or in giving them the narrowest interpretation *where the mischief to be redressed by the statute is equally applicable to all of them.* And where a word is used in a statute which has various known significations, I know of no rule that requires the court to adopt one in preference to another simply because it is more restrained, *if the objects of the statute equally apply to the largest and broadest sense of the word.* In short, it appears to me that the proper course in all these cases is to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes best with the context and promotes in the fullest manner the apparent policy and objects of the legislature. [Citing *The Industry*, 1 Gall., 114.]

United States v. *Winn* was cited and approved by Judge Deady in *United States* v. *Mattock* (2 Sawy., 148), where it was held, in the construction of a penal statute, that the word "cattle" included sheep, the court saying that the intent of the legislature is as proper a subject of inquiry for the court in the case of a penal statute as any other, and that sheep were within the mischief to be remedied by the act in question.

The principle of these decisions operates not only to enlarge the contents of any given word, but equally

applies to the present situation, fairly demanding an enlarged and liberal view of the whole intent of the statute.

In the *Wiltberger case* (5 Wheat., 76) Chief Justice Marshall, discussing the rules of construction of penal statutes, says that "to determine that a case is within the intention of a statute, its language must authorize us to say so." Upon this test does the present case offer any real difficulty? It must not, indeed, be forgotten that the object is remedial and for the general welfare, and that the act is penal only in providing a moderate "penalty," $100 (sec. 6, as amended by act April 1, 1896, 29 Stat., 85), for which a simple suit to recover the same is to be instituted—in other words, a civil action. (*Atcheson* v. *Everitt*, 1 Cowp., 382; *Ketland* v. *The Cassius*, 2 Dall., 365; *United States* v. *La Vengeance*, 3 Dall., 297; *The Sarah*, 8 Wheat., 394.)

But applying unqualifiedly the test in the Wiltberger case, since the statute says "equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars," does that language not authorize us to say that whatever the casual meeting of different types of couplers, and although Congress did not prescribe any particular design, the requirement of automatic coupling between the devices actually coming together, of practical and effective interchangeability, without the familiar risk to person which was the great evil sought to be remedied, is necessarily laid down? The statement of the court below

that "the second section declares it to be illegal to use cars without automatic couplers" is inaccurate. If that were the language, it might go far to sustain the court's views, in which Judge Thayer concurred, while dissenting on the other propositions as to the meaning of the word "car" and the nature of the traffic. But the language is, as we have quoted just above, "equipped with couplers coupling automatically by impact," etc. Coupling automatically by impact when or with what? As a theoretical operation or an ideal preparedness, to be realized only when the corresponding device happened to be presented, on the one hand, or, on the other, as a practical condition of interchangeability to be ready at all times and to work properly without the necessity of men going between the ends of the cars? Surely the latter is the true view; otherwise, the statute is nugatory except in a haphazard and casual way when types that work together happen to meet.

It will not do to say that Congress was aware that many makes not working interchangeably were constantly and necessarily meeting in the operation of railroads in the vast interchanges of traffic all over the country, and that Congress did not see fit to prescribe any particular type or adopt a specific standard. Congress was aware of this difficulty, as we have shown above. Congress was aware of the same condition, and prescribed no special make or standard when the amendment of 1903 was enacted, which applied the law of 1893, "whether or not the couplers brought together are of the same kind, make, or type." The act of 1893

(sec. 3) expressly recognizes the right of interstate railroads to refuse to receive from connecting lines cars not sufficiently equipped with power brakes. Unless the rule *expressio unius est exclusio alterius* is necessarily and uncompromisingly to be applied, *non constat* that a carrier properly equipped itself as to couplers under the law could not justly refuse to receive cars not thus properly equipped.

It may be observed that this remedy was supposed by the Interstate Commerce Commission to have been open to the railroads, for in the annual reports of the Commission the following statements appear upon this point:

> In the matter of couplers the aim of the law is that the men shall not be required to go between cars in order to couple or uncouple them, and therefore a road must not only equip its own cars with couplers that are interchangeable, but can not use upon its line the cars of other roads which do not automatically couple with their own. (Seventh Annual Report, 1893, p. 76.)
>
> Many of the couplers claimed to be automatic only couple automatically with those of the same pattern or type, and not with the couplers in more general use. Equipment of cars with this class of couplers will apparently compel the owning carriers to confine their use to railroads using similar types and to trains composed entirely of cars so equipped. (Tenth Annual Report, 1896, p. 94.)
>
> Plainly, if carriers use different types of couplers which do not work automatically with

> each other, the law is violated when a carrier undertakes to haul two cars so equipped in the same train. This was pointed out by the Commission in its report to Congress for the year 1893, and has been generally understood and followed by carriers throughout the country. (Sixteenth Annual Report, 1902, p. 61.)

These statements and their necessary implications mean that in order to avoid a violation of law carriers could properly refuse to receive cars not equipped in conformity with the law. But here it is not necessary to appeal to this principle, for the fact is, and will hardly be challenged, that the dining car belonged to the Southern Pacific Company and the dining service only was conducted by the Pullman Company. If the facts were otherwise, the usual close and continuous contract relations between railroad companies and such transportation companies as the Pullman would render it indefensible that an engine with a Janney coupler and a car with a Miller hook should come together. But when the company ownership and control of the car are regarded and the long period of time allowed for compliance with the law, seven years and seven months in all, there is no excuse.

It appears to be true that ordinarily the meeting of the dining car with another engine or car was at Ogden, and that the meeting at Promontory on the day in question was accidental and unusual. Usually, no doubt, the dining car when coupled on at Ogden met a car at the end of the west-bound train, and not the engine. It may be true that the opposing car usually

happened to present a corresponding device, viz, a Miller hook, but none of this plainly appears from the record, and in any event it was likely at any time, as actually happened, that an engine with one device and a car with a device not working interchangeably would meet. Certainly, the very thing which happened was likely to occur whenever the east-bound train was late.

In the particular case presented, whatever the casual conditions and requirements of general car interchanges may have been, here there was no question of interchange with a foreign car, both engine and car belonged to the Southern Pacific Company, both were used and engaged generally and in this special instance in interstate traffic, and the company should have seen to it that the Federal law was strictly observed and no chances taken on its true import and meaning.

We respectfully submit that these observations suggest the true measure of the respondent's responsibility and constitute the answer to the position advanced by both the court and the dissenting judge on this particular point. The language of the court is:

> There are several kinds or makes of practical and efficient automatic couplers. Some railroad companies use one and the others have adopted other kinds. Couplers of each kind will couple automatically with others of the same kind or construction, but some couplers will not couple automatically with couplers of different construction.

The necessary inference from this is that there are

couplers not of the same kind or make which will couple automatically by impact without risk to human life or limb not only with their own kind but with each other. This is in accordance with the fact, as brought out at the Senate hearing *supra*, and as is well-known. That is to say, Congress did not need to prescribe any particular type or make, and thus appear to aid in establishing a monopoly, but properly left a range of choice without weakening the meaning or impairing the effectiveness of the law. Up to this not difficult requirement, which gave freedom of choice along with liberal extension of time for cause shown, interstate carriers were fairly bound to come; and certainly this carrier in this case, in view of its usual control over a car daily moved and used in interstate service on its line.

It may be said that the petitioner was coupling and not uncoupling, and that it is only to the act of uncoupling that the statute applies the clause "without the necessity of men going between the ends of the cars." That point was disposed of in the *Voelker case* (*ut supra*), Van Devanter, J., speaking for the court as follows:

> This is assigned as error, and in support of the assignment it is urged, first, that the act of Congress does not forbid the use of a car having an automatic coupler "to prepare which for the impact" it is necessary to go between the ends of the cars, but is satisfied with a coupler which when so prepared will couple automatically by impact; that the terms of the Congressional act are such "that the test of a man

going between the ends of the cars is applied to uncoupling only, and that no such test is applied to coupling." * * * The risks and dangers which attended the old link-and-pin system, when couplings and uncouplings were effected by going between the cars, were such a menace to the lives and limbs of those employed in that branch of the railroad service, and these risks and dangers inhered so largely in the act of going between the cars, whether in the act of coupling or uncoupling, that there can be no doubt of the purpose of the Congressional enactment as well as that of the State to obviate and prevent this act of exposure, which the invention and use of automatic couplers had demonstrated to be wholly, or at least largely unnecessary. The State statute plainly and without uncertainty calls for "*automatic couplers* so constructed as to enable any person to *couple or uncouple them without going between them.*" If there be uncertainty in the Congressional act it is obviated by merely inserting a comma after the word "uncoupled" in that portion of the act which calls for "*couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.*" The concluding phrase then literally applies to both the coupling and uncoupling.

Punctuation is a minor and not a controlling element in interpretation, and courts will disregard the punctuation of a statute or unpunctuate it, if need be, to give effect to what otherwise appears to be its purpose and true meaning. [Citing authorities.] Obviously the purpose of

> this statute is the protection of the lives and limbs of men, and such statutes, when the words fairly permit, are so construed as to prevent the mischief and advance the remedy. The mischief to be prevented rested quite as much in the act of coupling as in the act of uncoupling. Science had offered, and practical use had approved, a remedy applicable not alone to the act of uncoupling, but also to that of coupling.

In *Carson* v. *Southern Railway Co.* (46 S. E. Rep., 525, 530, 534), the railway company alleged error based upon their theory that the law does not require couplings to be so arranged as to obviate the necessity of men going between the ends of the cars for the purpose of adjusting the knuckles, the charge of the trial judge, on the other hand, holding it to be negligence if the plaintiff, in order to make the coupling, or in order to adjust the knuckles, has to go between the ends of the cars. The exception was, however, overruled in the appellate court, thereby sustaining the view that the law applies to couplings as well as uncouplings.

Certainly, to a plain understanding, the act of coupling would seem to be more dangerous and to require more protection than the act of uncoupling. In uncoupling, the engine could give the slack necessary to release the pin, knuckle, or hook before the employee would have to go between the cars at all, and then he would only need to lift the pin or open the meeting surfaces without further motion by the engine, and then retire before the engine went either forward or

back. In both operations no doubt practically employees must act quickly and commonly take some chances of injury, but coupling would appear to be rather more dangerous than uncoupling. urthermore, as the coupling was to be automatic and by impact, manifestly it was not contemplated that men should go between the cars for that purpose, in which case the coupling could not be said to be "automatic;" and yet without an express provision, it might be regarded as left open to doubt whether for uncoupling they might go between the cars. So it is very clear, in whatever aspect the matter is viewed, that the provision "without the necessity of men going between the cars" covers both the acts of coupling and uncoupling.

It is not clear what the learned court below means by denouncing the construction of section 2 for which the petitioner contends as interpolating an *ex post facto* provision in the statute. The law was passed in 1893. By its terms it fixed January 1, 1898, as the date when the requirement of automatic coupling appliances should become effective, and successive extensions of time have since been granted to the railroads under the authority vested in the Interstate Commerce Commission (sec. 7) upon application and for good cause shown. An extension of two years beyond the five years granted by the law was first allowed by the Commission, and at the end of that period another extension of seven months was granted, and the Southern Pacific Company received the benefit of these extensions.

The only question is, what was and is the true meaning of the language used in an act which suspended its own operation for nearly five years and contained the germs of further suspension which have borne fruit? The law is altogether prospective in its terms and effect, and its true character is obscured by denominating the logical argument as to its real intention and scope as interpolating an *ex post facto* provision.

IV.

THE CAR WAS "USED IN MOVING INTERSTATE TRAFFIC."

The circuit court of appeals held that this case was not within the statute on the further ground that when the accident occurred the dining car was not used in moving interstate traffic, in view of the fact that it was empty and had not actually begun its trip.

We contend that this construction of the phrase "used in moving interstate traffic" is too narrow and refined for the purposes of this act. The words must at least be held to mean *regularly* used in moving interstate commerce, as was the case here. They do not refer merely to a single trip, nor contemplate that a car shall be so engaged at the particular time when a cause of action may arise, but that it shall be *ordinarily or customarily employed* in that manner. The dining car in question had been constantly used for several years to furnish meals to passengers between San Francisco and Ogden, and was used only for that purpose. On the day of the accident, the east-bound train was so late that it was found impracticable to get the car to Ogden in

time to return on the next west-bound train. It was accordingly dropped off at Promontory, in the State of Utah, to be picked up by the west-bound train when it arrived on the same evening. (Rec., pp. 21, 22, 35.) How can it be contended that this car was not used in interstate commerce because at the moment it was being turned, preparatory to its west-bound trip, it was empty and had been waiting on a sidetrack for the arrival of the train which should carry it back to San Francisco from whence it had arrived only a few hours before?

We claim that the car was so impressed with the character of interstate traffic that it was as fully within the act when it was being turned at Promontory, as it would have been if actually attached to the train on its return trip to San Francisco. That it was empty made no difference; and the circuit court of appeals, in remarking that the defendant could have drawn the dining car "vacant over every foot of its railroad" without violating the law was clearly in error. The danger to railroad employees which the statute was designed to obviate is the same whether the car is loaded or empty. The statute applies, not only to loaded cars, but to all cars, whether empty or loaded, which are "used" in interstate commerce.

In *Malott* v. *Hood* (99 Ill. App., 30) it was held that a car, even when empty, forming part of a train engaged in carrying merchandise from one State to another, was, within the meaning of the statute, a car used in interstate commerce. And the decision in *Winkler* v. *Philadelphia and Reading Ry. Co.* (53 Atl.,

90) goes even further, and holds that although the car to which a locomotive was being coupled was not used in interstate traffic, the case was within the statute if the removal of such car was a necessary step in getting at and moving an interstate car.

In *Voelker* v. *Chicago, M. and St. P. Ry. Co.* (116 Fed. Rep., 867, 873–874) the court said:

> The beneficent purpose of [the safety-appliance acts] is defeated if the employees are required to handle cars not equipped as required by the statutes, without regard to the question whether the cars are loaded or not. * * * This duty of proper equipment is obligatory upon the company before it uses the car in connection with interstate traffic, and it is not a duty which only arises when the car happens to be loaded with interstate freight. It frequently happens that the railway companies load cars * * * in the Western States and carry the same to the Eastern markets, and then return these cars without a load; but it can not be true that on the eastern trip the provisions of the act of Congress would be binding upon the company because the cars were loaded, but would not be binding upon the return trip because the cars were empty.

In *Crawford* v. *New York Central and Hudson River R. R. Co.* (10 American Negligence Reports, 166) the supreme court of New York in charging the jury spoke as follows:

> The other claim of the defense is that, as to these particular cars, they were not in use for interstate commerce because they were not on

> the road in matter of transit at the time but were in the yard itself. As to that, I charge you if the cars were cars engaged and being used in interstate commerce, it matters not whether they were being made up in the yard or were moving at the time out on the road, because the statute is intended to protect brakemen against the danger of such work, so far as it can protect them against such dangers; and it matters not whether interstate-commerce cars were being made up to start out on the road or whether they were actually moving along between the States at the time, so far as the purpose and intent of the statute is concerned. In fact, in the making up, there is more necessity for the brakemen to be at their work coupling the cars, bringing them together, than in the operation of the cars after they once start out from New York for Boston, New Haven, Chicago, or elsewhere.

In support of the view that the dining car in this case was not used in interstate traffic, the circuit court of appeals cited the cases of *Coe* v. *Errol* (116 U. S., 517) and *Norfolk and Western R. R. Co.* v. *Commonwealth* (24 S. E., 837). In the former case the question was whether certain logs which were cut in New Hampshire and hauled to a river in order that they might be transported to Maine, were liable to be taxed in the former State before transportation to the latter State had begun; and the court held that, for the purpose of taxation, the logs did not pass from the jurisdiction of the State in which they were until transportation actually began.

It is submitted that the decision in that case can not govern the present issue. The difference between merchandise which may at some future time become an article of interstate commerce, but which has not yet started on its course of transportation and is still within the State of its origin, and an instrument regularly used in moving interstate commerce, which has stopped temporarily while making its regular trip between two points in different States, is too plainly marked to require analysis.

Cases more nearly in point are those arising under State statutes regulating the manufacture, sale, and transportation of intoxicating liquors within the State, and involving the question as to the time when articles of interstate commerce cease to be under the control of Congress and become part of the common property of the State and subject to its unimpeded control. In those cases the court has held that the power vested in Congress to regulate commerce extends beyond the borders of the State, and follows the subject of control until its final point of destination and delivery to the consignee. (*Bowman* v. *Chicago and Northwestern Ry.*, 125 U. S., 465; *Leisy* v. *Hardin*, 135 U. S., 100, and cas. cit.; *Rhodes* v. *Iowa*, 170 U. S., 412, and cas. cit.)

But the rules laid down in those cases, as well as in *Coe* v. *Errol* (*supra*), can not apply to or govern the case at bar in view of the fundamental difference existing between products which are articles or subjects of interstate commerce and the carriers or vehicles of such products. In the one case the articles make a distinct

and single journey from one given point to another, and reach a definite and *final* destination, where they mingle with and become a part of the common mass of property within the State. In the other case the carrier is engaged in the business of regularly transporting such products between the States, making journeys for that purpose from point to point and constantly changing the destination of the vehicle.

In the case of *Norfolk and Western R. R. Co.* v. *Commonwealth* (24 S. E., 837), also cited by the court below, it was held, upon the authority of *Coe* v. *Errol*, that a freight train composed of empty coal cars which was on its way to a point outside the State for the purpose of transporting coal within the State was not engaged in interstate commerce. The conclusion was based upon the ground that—

> The common carrier has the * * * right to change his mind and ship on other cars than those which he may have provided for that purpose, and the cars which were intended for that purpose may never be used.

We contend that, even if such reasoning is sound as applied to the case of a train of empty cars passing through the State, which, as the agreed statement of fact showed, was to be broken up at a certain point within the State and, as soon as practicable, put into another train with another engine and crew, and then sent outside the State, yet it is not applicable to a dining car which, so far as the record shows, was used exclusively to make regular trips between Ogden and San Francisco, and where the intention immediately

so to use the car was manifested by the act of turning it in readiness for being picked up by the coming westbound train. Not only was there an intention to use the car in interstate traffic, but it was actually being so used.

Judge Thayer, stating his opinion that "within the fair intent and import of the act the dining car in question at the time of the accident was being hauled or used in interstate traffic," well says:

> The reasoning by which a contrary conclusion is reached seems to me to be altogether too refined and unsatisfactory to be of any practical value. It was a car which, at the time, was employed in no other service than to furnish meals to passengers between Ogden and San Francisco. It had not been taken out of that service, even for repairs, or for any other use, when the accident occurred, but was engaged therein to the same extent that it would have been if it had been hauled through to Ogden, and if the accident had there occurred, while it was being turned to make the return trip to San Francisco. The cars composing a train which is regularly employed in interstate traffic ought to be regarded as used in that traffic while the train is being made up with a view to an immediate departure on an interstate journey, as well as after the journey has actually begun.

Again, if the lower court is correct in its conclusion, it would follow that a car, while in the act of making its interstate journey, would be under the control of Congress, and after reaching its destination and while

waiting for the train to be made up for the next trip, would be subject to regulation by the State.

There can be no such divided jurisdiction; the regulation must be wholly in Congress or wholly in the State. (*Hanley* v. *Kansas City Southern Ry. Co.*, 187 U. S., 617, 620.) Mr. Justice Holmes, delivering the opinion of the court in the case just cited, refers to the cases of *Lord* v. *Steamship Co.* (102 U. S., 541) and *Pacific Coast Steamship Co.* v. *Railroad Commissioners* (9 Sawy., 253), which decided that navigation on the high seas between ports of the same State is subject to regulation by Congress, and is not subject to regulation by the State. In the latter case Mr. Justice Field said: "To bring the transportation within the control of the State, as part of its domestic commerce, the subject transported must be within the entire voyage under the exclusive jurisdiction of the State."

We recur to the statements of the court below that "it would be no violation of the statute for a carrier to haul an empty car not used to move any interstate traffic from one end of its railroad to the other." This statement evidently contemplates *any* carrier, and therefore interstate carriers.

In *Gibbons* v. *Ogden* (9 Wheat., 1) Justice Johnson used the following language in his concurring opinion (pp. 229–230):

> Commerce, in its simplest signification, means an exchange of goods; but in the advancement of society labor, transportation, intelligence,

> care, and various mediums of exchange become commodities and enter into commerce; the subject, *the vehicle*, the agent, and their various operations, become the objects of commercial regulation.

This definition of commerce has been followed in numerous decisions of this court. In the most recent case (*Hopkins* v. *United States*, 171 U. S., 578, 597) Mr. Justice Peckham said:

> We know from the cases decided in this court that it [interstate commerce] is a term of very large significance. It comprehends, as it is said, intercourse for the purposes of trade in any and all of its forms * * * and the power to regulate it embraces all the instruments by which such commerce may be conducted. [Citing *Welton* v. *Missouri*, 91 U. S., 275; *Mobile County* v. *Kimball*, 102 U. S., 691; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S., 196; *Hooper* v. *California*, 155 U. S., 648, 653; *United States* v. *E. C. Knight Co.*, 156 U. S., 1.]

Now, the vehicle, we submit, not only is an instrument of interstate commerce, or "used" in interstate commerce, when it is proceeding on a journey from one State to another carrying goods for delivery beyond the State of origin, but also is embraced in such commerce and subject to the regulation of Congress on principle and under the definitions of commerce whenever it crosses State lines, whether empty or not. Perhaps some sporadic and extreme case could be imagined which would create doubt of this statement, but let us consider the matter.

In the first place, this law provides for the requisite equipment on any car "used in moving interstate traffic." Manifestly this means, not necessarily so used on the particular occasion, but ordinarily and commonly used, or, indeed, likely or intended to be used. For it is a perfectly well-known and obvious fact that almost all cars are commonly so used and are constantly subject to such use. Even the passenger equipment of very many roads passes through several States, either on their own lines or by connecting arrangements as parts of through trains; the cars of the sleeping and parlor car companies not only make similar runs, but are constantly shifted to different territory and service throughout the country; and, in particular, the aggregate supply of freight cars of all railroads, constitute a source of common equipment, so to speak, and are freely interchanged and used by foreign lines on a mileage basis of rental. They disappear from the owning lines and are in service away from home for long periods of time, and in any pressure for cars must be traced and recovered. This accounting and tracing work is an important and well organized branch of the administration of railways. The vast majority of cars, from this point of view, are used in moving interstate traffic.

Cases might be suggested of switching engines in yards, or of a special line of cars which never leave a State, but even so such engines are constantly used in actually moving interstate traffic, and such cars would often become part of the moving force, under the doc-

trine of the Delaware case (*supra*) that an intrastate car which needs to be moved to get at an interstate car must be properly equipped under this law. So, too, the statute applies to cars that never go outside the limits of a State, "if they are used in moving interstate traffic"—that is, if they form a link in interstate transportation. It will thus be perceived on slight reflection how interdependent these relations are, and how far-reaching, necessarily, are the requirements of the Federal law. Undoubtedly the end in fact and in railway policy will be uniform equipment everywhere as to all essentials, in State as well as interstate service.

It is to be observed that whereas the original act applied to any car *used in moving interstate traffic*, the act of 1903 provides that the original act "*shall be held to apply* to all trains, locomotives, tenders, cars, and similar vehicles *used on any railroad engaged in interstate commerce*."

We venture to say that excepting the cars of lateral mine and timber lines wholly within a State, there are comparatively few cars in this country which are not used in moving interstate traffic in the sense of this law. If a car is sometimes or may be so used, then the only safe course is to equip under this statute as well as when it is chiefly or commonly so used.

Let us now look at the status of an empty car from a broader standpoint. It is a vehicle, the ordinary agent or rather instrument of carrying the subjects of commerce. As part of a train moving across the country and passing State lines, it is in itself a visible

part of the process of interstate transportation. That process is commerce, a branch of commercial intercourse. Either as an instrument of commerce—the most familiar and frequent instrument—proceeding interstate to its particular service, or as a subject of commerce being conveyed at the particular time in the normal way, on its own wheels, to its destination, the empty car is certainly within the regulative power of Congress. The power is very inadequate and lame, indeed, if such a case, of an empty car hauled across the States, possibly from one end of the country to the other, can escape its grasp. It is difficult to conceive how such a car could fall into other than one of two or three categories; either it would be returning from delivery of interstate goods to perform another such service or resume an intrastate service subject to similar diversion at any time; or it would be going from one temporary intrastate service to another with the same liability to an interstate call, or else from an intrastate service to take up an interstate load elsewhere; or, finally, it would be proceeding under a contract of sale or hire to another State, there to engage in home or foreign commerce. In all the cases imaginable, we submit, the empty car would still be impressed with the quality of transporting instrument (as was plainly the case here on the stronger grounds of a regular and continuous service), or would itself be the transported subject of commerce, and in either character would be included in the authority of Congress to regulate commerce among the several States. And

therefore we respectfully insist that this law is a valid exercise of the power of Congress to regulate interstate commerce and undoubtedly embraces the present case, although during the brief interval when the car was awaiting the west-bound train and being turned for that coupling it may have been empty. But the record does not show that it was empty, and it is a fair presumption that at least its larder was stocked for the trip west.

On the whole case, and in conclusion, we respectfully submit that when this engine and tender and the dining car came together they were not equipped as the law directed "with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars;" and that the judgment below is therefore erroneous and must be reversed.

WILLIAM H. MOODY,
Attorney-General.
HENRY M. HOYT,
Solicitor-General.

O

W. O. JOHNSON vs. SOUTHERN PACIFIC COMPANY.

[House Report No. 1678. Fifty-second Congress, first session.]

SAFETY OF RAILWAY EMPLOYEES AND THE TRAVELING PUBLIC.

JUNE 27, 1892.—Referred to the House Calendar and ordered to be printed.

Mr. John J. O'Neill, from the Committee on Interstate and Foreign Commerce, submitted the following report (to accompany H. R. 9350):

The Committee on Interstate and Foreign Commerce, to whom were referred various bills to promote safety of railway employees and the traveling public, submits the accompanying bill in lieu thereof, and the following report:

ATTENTION FIRST CALLED TO SUBJECT.

At a meeting of the railroad commissioners of the country held at Washington in the spring of 1888, the reports from the States where railroads are required to report each and every accident showed such an extraordinary percentage of casualties to the men engaged in handling the trains that a resolution was unanimously adopted urging the Interstate Commerce Commission "to consider what could be done to prevent the loss of life and limb in coupling and uncoupling freight cars and in handling the brakes for such cars."

DEMAND OF EMPLOYEES FOR PROTECTION.

Following this railroad commissioners' conference the order of Brotherhood of Railroad Brakemen sent to the Interstate Commerce Commission a petition with 9,682 names attached, in which they ask the Commission to take such steps as they may think proper to bring about the adoption of automatic couplers and brakes on freight cars used on the railroads of the United States, and earnestly appealing to the Commission to urge upon Congress the necessity of national legislation, that the terrible slaughter of brakemen on the railroads of the country might be diminished.

As a result inquiries were instituted by the committee appointed by the National Convention of Railroad Commissioners and it was ascertained that during the year ending June 30, 1889, over 2,000 railroad employees were killed in the service and more than 20,000 injured. The publication of these facts awakened popular interest and formed a strong public opinion demanding legislation requiring the use of safety appliances.

PRESIDENT'S MESSAGE.

The President interested himself in the matter and December 3, 1889, sent a special message to Congress, from which we take the following extract:

It is competent, I think, for Congress to require uniformity in the construction of cars used in interstate commerce and the use of improved safety appliances upon such trains. Time will be necessary to make the needed changes, but an earnest and intelligent beginning should be made at once. It is a reproach to our civilization that any class of American workmen should, in the pursuit of a necessary and useful vocation, be subjected to a peril of life and limb as great as that of a soldier in time of war.

APPEAL TO CONGRESS BY RAILROAD EMPLOYEES.

The grand lodges of the Brotherhood of Switchmen, Railroad Trainmen, Locomotive Firemen, Locomotive Engineers, Order of Railroad Conductors, and National Association of Railway Surgeons, either by the grand officers of the several orders or by resolution at their conventions, have asked from Congress the enactment of a law requiring the use of automatic couplers and train brakes on freight cars.

A petition signed by over 10,000 railroad trainmen or yard men, in actual service, was also sent to Congress, stating that they believed the passage of such a law would reduce the death rate among them fully 50 per cent. Upon the assembling of the present Congress, the President in his message called its attention to this subject, and various bills have been introduced and referred to this committee.

NATURE OF ACCIDENTS.

We have carefully examined as to the nature of the accidents to which railway employees are exposed, and if the causes that result in so many deaths, so much pain, and such widespread suffering can not be mitigated if not obviated by legislation.

The demand of railway employees for the protection of the law came to us with great force as we recognized that they could not to any great extent guard against the casualties to which they were exposed; they must face the danger while others determined the conditions under which they labor.

The nature of the accidents to which railway men are exposed appear in the following tables obtained from the Interstate Commerce Commission:

Railway accidents to employees for the years ending June 30, 1889 and 1890.

Kind of accident.	1889.		1890.	
	Killed.	Injured.	Killed.	Injured.
Coupling and uncoupling	300	6,757	369	7,842
Falling from trains and engines	493	2,011	561	2,948
Overhead obstructions	65	296	89	943
Collisions	167	830	235	1,095
Derailments	125	655	150	720
Other train accidents	189	1,016	146	894
At highway crossings	94	45	22	32
At stations	70	699	98	691
Other causes	539	7,729	754	8,250
Unclassified			27	236
Total	1,972	20,028	2,451	22,306

The number of employees engaged directly in the handling of trains, June 30, 1890—that is, trainmen, switchmen, yardmen, engineers, firemen, and conductors—was 153,235, and out of this number there occurred 1,459 deaths and 13,172 injuries due to some form of railway accident. A glance at the above table for the same year indicates at once where the chief danger lies. The total number killed in coupling and uncoupling cars was 369, and the number injured was 7,841.

The number killed in falling from trains and engines was 561 and the number injured was 2,363; that is to say, 38 per cent of the total number of deaths and 46 per cent of the total number of injuries sustained by railway employees resulted while coupling cars or setting brakes, and whatever cuts off these two sources of great danger would largely reduce the total losses of life and limb.

REMEDY SUGGESTED.

It is the judgment of this committee that all cars and locomotives should be equipped with automatic couplers, obviating the necessity of the men going between the cars, and continuous train brakes that can be operated from the locomotive and dispense with the use of men on the tops of the cars; that the locomotives should be provided with power driving-wheel brakes, rendering them easy of control.

UNIFORMITY REQUIRED.

The efficiency of such devices, provided that all cars and locomotives be furnished with uniform type of coupler and brake, is generally admitted; without uniformity the danger to employees is fully as great as with the old link-and-pin coupler and hand brake, and representatives of the switchmen and trainmen who appeared before the committee stated that unless there could be uniformity they would prefer to go back entirely to the old link and pin; that the danger had increased from the use of so many different types, which statement seems corroborated by the large increase in casualties appearing in the statistics of 1890 over those of 1889.

STANDARD TYPE REQUIRED.

The interest of the railroads as well as the dictates of humanity demand that a standard type shall be established as soon as possible. The increased public interest in this question and the uncertainty as to what Congress may do has seriously retarded the work of fitting the trains with automatic couplers and brakes, which many of the railroads are anxious to apply, but do not deem it prudent to incur this vast expense with the danger of complete loss by the subsequent adoption, through Congressional action, of some different type.

With the standard type once established a large majority of the roads would take immediate steps to conform to it. Their managers are progressive, have an intense sympathy with their men, and from a strong sentiment of humanity, and also recognizing it as a feature of great economy to their roads, they would proceed at once to equip them with safety appliances, although it would require the application of a law to compel many of the roads to conform to it.

RAILROADS UNABLE TO DECIDE.

That the roads, no matter how well intentioned, by their own unaided efforts can obtain any uniformity of action on this subject within any reasonable time is not possible; they require the aid of law.

The Secretary of the Interstate Commerce Commission last November issued a set of inquiries to presidents of different railroads.

The replies to the question regarding the best means of bringing about uniformity in safety car couplers are not clear in many cases, but the following statement shows as near as possible the position of the roads:

Roads, representing 13,014.24 miles of road operated, in favor of national legislation ---------- 69
Roads, representing 46,791.09 miles of road operated, in favor of voluntary action by the railroads ---------- 88
Roads, representing 139.09 miles of road operated, in favor of State legislation ---------- 2
Roads, representing 11,915.88 miles of road operated, in favor of the M. C. B. types of couplers ---------- 17
Roads, representing 4,829.83 miles of road operated, in favor of different couplers ---------- 10
Roads, representing 9,447.79 miles of road operated, expressing the opinion that the matter is still in the experimental stage ---------- 15

While 145 roads, representing 38,985.59 miles of road operated, expressed no opinion.

Several roads express themselves in favor of the Safford coupler.

This report shows what might have been expected when taken in connection with the fact that there are forty-four different kinds of couplers and nine kinds of train brakes in actual use.

THE STATES UNABLE TO PROVIDE REMEDY.

The incompetency of the States to meet the situation is illustrated by the fact that the legislatures of Massachusetts, Iowa, Mississippi, Nebraska, Minnesota, New York, Ohio, Michigan, Wisconsin, and other States, realizing their inability to afford a remedy, have called upon Congress to act.

CONGRESS ALONE CAN ACT.

The national convention of railroad commissioners at each convention during the past three years have requested Congress to legislate upon this subject.

There are more than one million freight cars, scattered all over the country, that can be reached only by legislation of equal extent.

To obtain uniformity in couplers we must invoke the law of the United States to provide a method of securing the adoption of some standard type, and, if need be, to compel its use.

PROVISIONS OF THE BILL.

Five things appear to be fundamentally important, and for these the bill provides:

(1) *The application of driving-wheel brakes to locomotives.*—This concerns the safety of railway travel generally.

(2) *Train brakes for freight cars.*—The brakes have to be now largely operated by the brakemen, traveling over the tops of the cars by night and by day, through sleet and rain, exposed to great danger of falling from the cars or from overhead obstruction.

But with the train brake that can be immediately applied to the entire train the necessity of their going on top of the cars is obviated and a great measure of safety to all who travel will be brought into general use; for when the rails are in constant use by passenger and freight trains indiscriminately, running within a few minutes of each other, the driving brake and the train brake are essential means of safety to the traveler and the employee alike. No opposition has been heard to this requirement.

(3) *Automatic couplers.*—This has been previously fully discussed in this report.

The committee recognize that it is a serious question whether the best type of coupler has yet been devised, but they believe that if the railroads of the country are compelled to act, and reasonable time is given them to come together, the result will be the adoption of some uniform interchangeable type of coupler, and also train brake, that will prove satisfactory to them and will accomplish the result desired.

(4) *Uniform height of drawbar.*—The railroads have themselves largely established a uniform height of drawbar from the rails with a maximum variation. It sometimes happens, however, that when cars are started out from the road to which they belong they do not get back for many months, and during that time the drawbars are getting down until they get away from the standard, in which condition it is impossible to couple them with those of a standard height without using crooked links, the difficulty of which adds largely to the danger and death rate. It is therefore considered highly important that a standard height of drawbar from the rails with a maximum variation should be maintained, and that cars should not be used when out of repair.

(5) *Hand holds.*—Until the changes contemplated by this bill can be effected, and with a view to minimize the dangers by every means possible, we recommend a requirement of hand grabs or hand irons on all cars, something that the switchman or brakeman can seize to if he slips, instead of trying to clutch the side of a wet or perhaps icy car.

RAILROADS TO DESIGNATE STANDARD TYPE.

Believing that the standard type of coupler and brake should be established as soon as possible, it is provided that on July 1, 1893, the roads themselves shall by ballot decide, and in order to secure practical unanimity, that the vote of 75 per cent of the cars owned or controlled by the roads shall determine; and it is only in the event of their failure to agree then that the duty of selecting such type devolves upon the Interstate Commerce Commission.

WHEN LAW SHALL TAKE EFFECT.

In relation to the application of driving-wheel brakes to locomotives, most of them are now provided with them. Undoubtedly within a brief time all locomotives will be provided with them, and it is only

out of abundance of caution that the provision is inserted compelling their use after a certain date.

Concerning the application of safety couplers and train brakes, considering the enormous expense to the roads, we think reasonable time should be given.

The number of freight cars in use is 1,105,042, of which number about 87,390 are now provded with safety couplers and 100,990 with train brakes.

It is estimated that the cost of equipping a car with safety couplers and brakes is about $75, which involves an expense to the roads of many millions of dollars. We provide that after July 1, 1895, all new cars, and all old cars sent to the shops for general repairs to one or both of its drawbars, shall be provided with the standard couplers and brakes.

The average life of a freight car is estimated at about eight years, and we think the provision requiring old cars to be fitted with safety couplers and brakes by July 1, 1898, is not unreasonable—believing also that the establishment of an outside date does not imply a delay until that time, as undoubtedly most of the roads would, as soon as the standard was established, provide the means and arrange for the change at once.

EXPENSE AND SAVING TO THE ROADS.

The expense seems enormous and would appear harsh and oppressive, but we believe, in addition to the humane aspect of this subject, which touches all men alike, whether president, manager, or trainman, that in the great saving to the roads in the cost of running their trains and in the loss from suits at law, they will be fully repaid, and within a few years.

EXPENSE TO EMPLOYEES.

In estimating the expense to the roads it is but just that some reference be made to the vast outlay of money by the employees in their voluntary relief societies rendered necessary by the refusal of the insurance companies to take the risk, which is due to the fact that death and injury are greater among trainmen than in any other avocation followed by man.

The Brotherhood of Brakemen, to which but one-fifth of the brakemen belong, pays out not less than $37,000 per month—nearly half a million dollars a year. One order of the switchmen, numbering 10,000 members, pays out $170,000 per year. If all the different organizations of railway men would publish the amounts expended each year for the relief of their fellow-workmen and the care of their widows and orphans, it would show in all probability an expenditure of several million dollars each year.

OTHER DANGERS.

We recognize that national legislation can not reach all the sources of danger to trainmen, and we deem it proper to refer to some of them.

By overhead obstructions.—Last year 89 men were killed and 345

men were injured, undoubtedly due to the practice of building bridges, etc., without proper appliances that are commonly used to give adequate warning.

The improper manner of loading freight, such as lumber and machinery, on cars and permitting the end to project over the end of the car has resulted in the crushing of many a poor trainman.

This is also frequently caused by the concussion of the cars, thereby shifting the freight. The enforcement of the rules already made by the roads for the proper loading of cars would avert this danger.

Space between deadwoods.—It is urged on the committee that no freight cars shall be used (until the time when the necessity of going between to couple them has been done away with) which do not have a space of 18 inches to allow for a man's body when the deadwoods are in contact. The committee realize the very great importance of this and earnestly call the attention of the roads to this matter, and also to the necessity of rigid enforcement of their rules for the placing of hand holds on cars, and the keeping of the footboards, ladders, etc., in repair.

SAFETY TO TRAVELERS RECOGNIZED.

We recognize the extraordinary genius and enterprise of the railroad managers of our country, whose successful conduct of the interests in their charge is a marvel to the traveler, and to their wonderful management is undoubtedly due the comparative immunity from danger of the passengers on railways in the United States—during last year but one fatal accident to every 1,700,000 passengers carried, and but one injury for every 200,000 passengers carried.

The passenger trains being provided with automatic couplers, the percentage of injury to brakemen in that branch of the service is very slight, and by comparison lends additional argument for the legislation we propose.

THE DUTY OF CONGRESS.

In conclusion it may well be considered whether any matter before Congress at this time demands, in justice to humanity and justice to the bread winners of the country, so much attention and consideration.

The railway employees of the country are in every sense among its best bone and sinew, splendid types of physical manhood and vigor. They are active, intelligent, strong, and brave men; in the flower of their youth, many of them with families. When we reflect that during this present year, judged by the statistics of the past, probably 25,000 of these men will be killed or injured, and when we contemplate the misery and suffering that will be brought to so many poor homes, the failure of Congress to legislate on this subject would be almost a crime.

APPALLING COMPARISONS.

To rivet the public mind on the appalling list of casualties and bring home to all men the frightful loss of life, a glance at some of the decisive battles of the world will suffice.

Wellington won Waterloo and Meade Gettysburg with a loss of

23,185 and 23,203, while the total loss on both sides at Shiloh in two days' murderous fighting was 24,000.

In the three years' war of the Crimea England lost in killed and wounded 21,035 men.

None of these terrible battles furnished a list of losses equal to the loss in a single year of our railroad men, a loss equal, in fact, to the entire present force of the United States Army.

In the Johnstown flood 2,280 persons perished, while during the year 1890 casualties on our railways resulted in railway employees killed 2,451, and injured, 22,394. The Johnstown disaster filled the imagination with horror and sent a thrill of sympathy throughout the civilized world, but that calamity came in one fell swoop, while fatalities on the railways, involving in the aggregate a far greater sacrifice of human life, have scarcely attracted public attention. Nightly several poor fellows are picked off—in the freight yard, on the rail—often the only vestige that morning reveals being a pool of blood and the dismembered remains of the unfortunate victim. Two lines of a newspaper headed "Brakeman killed" tells the whole story.

The vast army of maimed men, of homes left desolate, and of widows and children bereaved appeals to Congress for action.

CONCLUSION.

The committee desires to report the fact that it has been greatly aided in its investigations by the efficient secretary of the Interstate Commerce Commission, Edw. A. Moseley, whose experience gained from years of devotion to this reform and the data in his possession were invaluable aids to its investigation.

Also that through the courtesy of the general manager of the Baltimore and Ohio Railroad they were enabled to thoroughly investigate at the company's yards the merits of the present automatic couplers and brakes.

The representatives of many of the roads aided us to the fullest extent in furnishing information to enable us, if possible, to reach a solution of this question.

The committee recommend the passage of the bill and that H. R. 117, 180, 334, 582, 5134, 6187, 7512, 6648, and S. 2951 lie upon the table.

[Senate report No. 1049, Fifty-second Congress, first session.]

AUTOMATIC COUPLERS AND POWER BRAKES.

JULY 22, 1892.—Ordered to be printed.

Mr. Cullom, from the Committee on Interstate Commerce, submitted the following report (to accompany H. R. 9350):

The Committeee on Interstate Commerce, to whom was referred the bill (H. R. 9350) to promote the safety of employees and travelers upon railroads, by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes, having had the same under consideration, report it with an amendment in the nature of a substitute, striking out all after the enacting clause and inserting what is reported to the Senate, and the committee recommends that the bill as proposed to be amended be passed.

This subject has been before Congress for several years, and the Committee on Interstate Commerce has given hearings upon various bills which have been introduced and referred to it at different sessions, but has not heretofore been able to agreee upon any bill which was regarded as satisfactory to the committee. While the committee has always believed it important that something be done to protect those engaged in the operation of railroad trains from injury, and in many cases death, it has been exceedingly difficult to arrive at a correct conclusion as to the character and provisions of legislation that would accomplish the purpose desired.

The President of the United States called the attention of Congress to the subject in his annual message in December, 1889, in the following language:

> The attention of the Interstate Commerce Commission has been called to the urgent need of Congressional legislation for the better protection of the lives and limbs of those engaged in operating the great interstate freight lines of the country, and especially of the yard men and brakemen. A petition signed by nearly ten thousand railway brakemen was presented to the Commission, asking that steps might be taken to bring about the use of automatic brakes and couplers on freight cars.
>
> At a meeting of State railroad commissioners and their accredited representatives, held at Washington in March last, upon the invitation of the Interstate Commerce Commission, a resolution was unanimously adopted urging the Commission "to consider what can be done to prevent the loss of life and limb in coupling and uncoupling freight cars, and in handling the brakes of such cars." During this year ending June 30, 1888, over 2,000 railroad employees were killed in service, and more than 20,000 injured. It is competent, I think, for Congress to require uniformity in the construction of cars used in interstate commerce and the use of improved safety appliances upon such trains. Time will be necessary to make the needed changes, but an earnest and intelligent beginning should be made at once. It is a reproach to our civilization that any class of American workmen should, in the pursuit of a necessary and useful

vocation, be subjected to a peril of life and limb as great as that of a soldier in time of war.

As did also the Interstate Commerce Commission in its annual report to Congress of the same year, as follows:

Two distinct ways of proceeding are naturally suggested. Congress may, should it see fit, pass definite statutes requiring that certain appliances be brought into use upon all the railroads of the country within a certain time; or, having in view the difficulty and importance of the question, it may prefer to make some provision for its further investigation, trusting that the mere fact that such an investigation is in progress will not be without immediate results.

This Commission is not prepared to recommend a national law prescribing appliances. It does not assume to say that such legislation will never be advisable, but it is not prepared to say it is advisable at present. The difficulties of formulating a law from which good results could be expected are certainly very great, if not insurmountable, and, although pains have been taken to secure the views of all interested, no legislation of this sort has been suggested that seems plainly to be wise and safe. A statute requiring that all freight cars be fitted with automatic couplers by a certain date—a requirement against which it is probable that less could be urged than against any other suggested—has already been shown to be open to serious objections. It is impossible to say what the results of such a law would be, but there is no certainty that they would be good. If it did not bring about uniformity—and there is no assurance that it would—it would be most injurious to all interests involved, including those of public safety.

While it is no doubt highly desirable that results be reached as soon as possible, it is still more desirable that no mistake be made.

Following this and up to April 30, 1890, there had been introduced in the Senate three bills, as follows:

S. 3292, Mr. Hoar, "to secure the safety of freight cars employed in interstate commerce by the use of proper couplers, freight-train brakes, and other appliances prescribed by the Interstate Commerce Commission."

S. 3665, Mr. Allison, "for the protection of property, trainmen, and other railroad employees in handling locomotive engines, freight trains, and freight cars engaged in interstate commerce."

S. 3692, Mr. Cullom, "to regulate the use of safety appliances for railway cars."

Beginning April 30, 1890, and continuing thereafter on various days, the Committee on Interstate Commerce of the Senate gave hearings in relation to safety couplers and power brakes on freight cars. During these hearings a number of prominent men interested in the subject were heard and a full discussion entered into. The opinions expressed as to what legislation, if any, was necessary to bring about the desired relief were so conflicting that the committee, after careful investigation, found it impossible to arrive at a conclusion.

At the second annual convention of railroad commissioners, held in Washington in May, 1890, it was—

Resolved, That the respective States should require, either directly or by law indirectly through the instrumentality of their railroad commissions, each railroad corporation subject to their jurisdiction to place driving-wheel brakes and apparatus on every locomotive constructed or purchased by it, and train brakes upon every freight car hereafter constructed or purchased by it, and also upon such cars and upon every freight car owned by it, the coupler or draw bar of which is repaired by it, an automatic coupler of the Master Car Builders' type at each end of the car.

Resolved, That Congress, either directly by law or indirectly through the instrumentality of the Interstate Commerce Commission, should take similar action.

The President, in his second annual message, submitted in December, 1890, again called the attention of Congress to the necessity for greater uniformity in safety appliances, in the following words:

It may still be possible for this Congress to inaugurate, by suitable legislation a movement looking to uniformity and increased safety in the use of couplers and brakes upon freight trains engaged in interstate commerce. The chief difficulty in the way is to secure agreement as to the best appliances, simplicity, effectiveness, and cost being considered. This difficulty will only yield to legislation, which should be based upon full inquiry and impartial tests. The purpose should be to secure the cooperation of all well-disposed managers and owners, but the fearful fact that every year's delay involves the sacrifice of 2,000 lives and the maiming of 20,000 young men should plead both with Congress and the managers against any needless delay.

At the third annual convention of Railroad Commissioners the subject was discussed at greater length, and it was resolved:

First. That a committee of five be appointed by the chair to urge upon Congress, as soon as possible after the opening of the next regular session, the imperative need of action by that body calculated to hasten and insure the equipment of freight cars throughout the country with uniform automatic couplers and with train brakes, and the equipment of locomotives with driving-wheel brakes, and present and urge the passage of a bill therefor.

Second. That the committee before presenting the bill to the appropriate Congressional committee, be requested, after public notice, to give a hearing to accredited representatives of such organizations of railroad officials or employees as may desire to be heard.

In his third annual message, in December, 1891, the President again invited the consideration of Congress to the appeal of railroad employees for greater safety in the performance of their duties:

I have twice before urgently called the attention of Congress to the necessity of legislation for the protection of the lives of railroad employees, but nothing has yet been done. During the year ending June 30, 1890, 369 brakemen were killed and 7,841 maimed while engaged in coupling cars. The total number of railroad employees killed during the year was 2,451 and the number injured 22,390. This is a cruel and largely needless sacrifice. The Government is spending nearly $1,000,000 annually to save the lives of shipwrecked seamen; every steam vessel is rigidly inspected and required to adopt the most approved safety appliances. All this is good; but how shall we excuse the lack of interest and effort in behalf of this army of brave young men who in our land commerce are being sacrificed every year by the continued use of antiquated and dangerous appliances? A law requiring of every railroad engaged in interstate commerce the equipment each year of a given per cent of its freight cars with automatic couplers and air brakes would compel an agreement between the roads as to the kind of brakes and couplers to be used and would very soon and very greatly reduce the present fearful death rate among railroad employees.

On February 10 and 17, 1892, and subsequent days the Committee on Interstate Commerce of the Senate again gave hearings to those interested for and against legislation of the character proposed in this bill. At one of these public hearings Mr. H. S. Hains, president of the Railway Association, submitted the subjoined statistics in respect to that association, which has a membership of roads representing 122,000 out of the 170,000 odd miles of railroad in the country. The statistics have relation to but 91 roads belonging to that association, with a mileage of 75,000 miles and representing 700,000 cars. These roads have adopted what is called the Master Car Builders' type of coupler, which Mr. Hains says are mutually interchangeable.

These roads had in use, fitted with this type of coupler—

	Cars.
January 1, 1887	6,300
1888	11,000
1889	22,000
1890	47,000
1891	84,000
1892	134,000
February 1, 1892	136,000

With 26,000 cars under process of construction to be thus equipped. That many railroads are doing a great deal in the matter is undoubtedly true. We find, however, that on June 30, 1889, the total number of cars in the United States, exclusive of those in the passenger service, was 1,041,890, and in the year ended June 30, 1890, there was an increase of 94,787. Of this number but 16,287 were equipped with train brakes, and but 31,651, or about one-third of those put in use during the year, were fitted with automatic couplers. At this rate it will readly be perceived that the time will not soon come, without legislation, when the freight cars of the country will be provided with safety appliances.

According to the report of the statistician of the Interstate Commerce Commission for the year ended June 30, 1890, the latest official statistics available, there were at that time, out of a total of 913,580 freight cars, only 78,475 equipped with train brakes and but 75,485 fitted with automatic couplers.

It may be urged that these statistics are old, and it is a matter of regret that later data are not now available. At the present time it is admitted that the rate of increase in the application of safety appliances is somewhat greater. Still the very latest information shows that one road alone during the year ended June 30, 1891, added 1,800 cars to its freight equipment, not one of which was provided with automatic couplers, and this is but an example. While it is not to be doubted that very many companies are doing all they can, consistent with wise management, and are manifesting a great desire to relieve their employees from danger in the conduct of business (and to those compulsory legislation of the character in the bill reported can be no hardship), it is equally true that there are other railroad managers who require the force of a national law and the spur of public opinion to induce them to take proper steps to reduce the risks to those subordinate to them.

It may be stated that to equip a car with automatic couplers on both ends costs about $25. There has been some variation between the figures given by different persons who appeared before the committee as to the cost of fitting cars with train brakes, some putting it at $45 or $50 per car, while others fixed it as high as $75 per car.

The total number of railway employees June 30, 1890, was 749,301. The number killed during the year ended on that date was 2,451, and the number injured was 22,396. Of the above total of 749,301 employees 153,235 were directly engaged in the train service, of whom 1,459 were killed and 13,172 injured. That is to say, out of every 105 men directly engaged in the handling of trains 1 was killed, and out of every 12 men so employed 1 was injured. In fact, it is proved by the statistics that the total loss in killed and injured in eight years is equal to the total number of men engaged in this service at any one time.

This fearful tale of suffering, of homes left desolate and of widows and children bereaved, appalling as it is, does not denote the only loss borne by the railroad employees of the country. The dangers of their calling have caused them to associate themselves in relief societies, and the loss or injury of a member not only appeals to the sympathy of his fellows, but necessitates a contribution from their hard-earned wages.

The Government annually expends nearly $1,000,000 for the safety of those who go to sea in ships. It is a well-known fact that the crews of these vessels are largely aliens, without families or homes in this country, and while no criticism of this fact is intended by this statement, it seems proper in this connection to bear in mind that the railroad employee is generally of the American soil, to the manor born, nurtured and bred an American citizen.

The necessity of national legislation looking toward uniformity in railway safety appliances is apparent, since it is admittedly a subject with which the various States can not successfully cope. Their incompetency to meet the situation is illustrated by the fact that the legislatures of Massachusetts, Iowa, Mississippi, Nebraska, Minnesota, New York, Ohio, Michigan, Wisconsin, and of other States, realizing their own inability to afford an adequate remedy, have called upon Congress to act. Were the use of freight cars limited to a single State, then State laws would be adequate, but the cars within any State at any particular time are largely such as pass from road to road and from State to State indiscriminately, no State line being recognized in railway traffic. The freight car of Massachusetts loaded with the products of that State may in three weeks reach California, passing from ocean to ocean; or the car of an Illinois road may pass through three or four States in a less number of days on its journey from the Lakes to the Gulf. Either of them may have the coupler sanctioned by the State from which it started, but from its lack of interchangeability with the couplers of those cars with which it must be coupled to perform its mission of transporting the commerce of the country it produces death and destruction in every freight yard it enters.

The committee heard the delegates of the Massachusetts legislature, who, under the instructions from that body, formally presented the legislative resolution of 1891, and also that of 1892. They heard, too, representatives of the organizations of the railway employees, earnest, strong men who for years followed the occupations of switchmen, brakemen, etc., some of whom had suffered in mutilation of limb, the necessary consequence of such employment, and who were thus, from actual experience, well qualified to speak for their fellow-workmen and the organizations they represented. These representative men, speaking for thousands of their associates, say that what they desire is uniformity, and that the danger of their calling has increased rather than diminished by the introduction of different types of couplers; that it would be far better to return to the old link and pin than to have so many kinds and styles of couplers in use. One of them, in every sense the type of an American switchman, said:

You want to understand that the switchman's life in the daytime has an even chance, but the man who works after dark has not the ghost of a show under the present system of things. All he has is a little bit of a hand lantern, which throws a light 10 or 20 feet. He goes in to make a coupling, and he does not know the conditions that exist there. He does not know whether it is a Janney

or a Hinson, a Dawling, a Drexel, or some other kind of a drawbar. We want something uniform—something that is standard—we want something made on the same model all the way through, and nothing else.

His statements are borne out by the facts, for investigation shows that among the trainmen there was an increase in the death rate of more than 10 per cent in 1890 as compared with 1889, and the efforts of many of the railroads to increase the safety of their employees has by the mere lack of uniformity and interchangeability of couplers added to the difficulty. This fearful increase of risk and hazard is worthy of serious consideration. Among no other class of organized labor is it so great, and, as before stated, one of the chief causes is the great variety of couplers used.

The last report of the Interstate Commerce Commission shows that 37 different styles of couplers are used. It is not claimed that this number covers all those now being experimented with, while it is estimated that there are 7,000 patented safety appliances.

What the railroad employees need to secure greater safety in the performance of their duties is uniformity. They want all couplers alike and perfectly interchangeable. Under existing conditions it is impossible to tell before going between the cars whether the employee will find the ordinary link and pin to couple together or two different varieties of the improved couplers now in use.

While it is true that the railroad managers who express themselves in favor of voluntary action toward uniformity by the roads are in the majority, too much weight should not be given to such testimony, as it can hardly be expected that railway companies will recommend laws compelling the expenditure of large sums of money, even if the time allowed should be extended indefinitely.

The committee is fully impressed with the desirability of leaving the railways to work out the problem without legislation, but on the other hand it can not be unmindful of the necessities of the situation and the increasing dangers to which employees are subjected on account of lack of united action on the part of the roads.

The committee listened with interest to the chairman of the committee representing the National Convention of Railroad Commissioners. A member of that committee and its secretary, together with others who have given careful attention to the subject, admit the condition which exists, and the differences among them relate merely to the proper remedy. While such variance of opinion exists to a greater or less extent, they are all agreed that legislation which allows each road to put on any automatic coupler its judgment dictates will not meet the requirements and will simply increase the evil.

It seems necessary, should a compulsory law be enacted, that some system of inspection should be established. It is therefore, by the substitute for the House bill, made the duty of the Interstate Commerce Commission to enforce the provisions of the proposed law.

The committee has given earnest attention to the subject, but has been delayed in reporting to the Senate by the conflict of opinion of those who were in favor of legislation as to the proper remedy to be applied and in order that no mistake should be made by legislation which should aggravate rather than diminish the awful loss of life now existing. At one time during the present session the committee felt that without more information than it possessed or could procure immediately, the testimony of men of all classes, railroad managers,

engineers, switchmen, brakemen, and others differing so widely on the question of the exact provisions of an act for relief, it would perhaps be better to defer any legislation compelling railroads to adopt a uniform type of automatic couplers and power brakes upon their cars and locomotives until another session, and, in the meantime, to require the Interstate Commerce Commission to procure detailed information on the whole subject, to be reported to Congress at the beginning of the session in December next.

With that view the committee reported a bill of the character above indicated, and it passed the Senate. This bill, however, has not become a law, although it passed the Senate some time since, and the committee therefore believe it to be its duty to recommend the passage of the bill herewith reported and to secure its consideration and passage at the present session.

The committee annex hereto the testimony taken and ask that it be printed as a part of the report.

AUTOMATIC COUPLERS AND POWER BRAKES.

HEARINGS BEFORE THE COMMITTEE ON INTERSTATE COMMERCE OF THE UNITED STATES SENATE IN RELATION TO THE BILL (S. 811) FOR THE PROTECTION OF PROPERTY, TRAINMEN, AND OTHER RAILROAD OFFICIALS IN HANDLING LOCOMOTIVE ENGINES, FREIGHT TRAINS, AND FREIGHT CARS ENGAGED IN INTERSTATE COMMERCE; THE BILL (S. 893) PROVIDING FOR THE ADOPTION AND USE OF A UNIFORM STANDARD AUTOMATIC CAR COUPLER, AND REGULATING THE OPERATION AND CONTROL OF FREIGHT TRAINS USED IN INTERSTATE COMMERCE, AND PROVIDING FOR THE GREATER SAFETY OF RAILROAD EMPLOYEES, AND FOR OTHER PURPOSES; AND THE BILL (S. 1618) TO PROMOTE THE SAFETY OF EMPLOYEES AND TRAVELERS BY COMPELLING COMMON CARRIERS ENGAGED IN INTERSTATE COMMERCE TO EQUIP THEIR CARS WITH AUTOMATIC COUPLERS AND CONTINUOUS BRAKES, AND THEIR LOCOMOTIVES WITH DRIVING-WHEEL BRAKES.

WASHINGTON, D. C., *February 10, 1892.*

The committee met at 10 o'clock a. m.

Present: Senators Cullom (chairman), Wilson, Hiscock, Higgins, Chandler, Harris, Gorman, and Jones.

STATEMENT OF W. E. RODGERS.

Mr. RODGERS. It may be proper to say, Mr. Chairman, that I appear here in consequence of having been appointed a member of what is known as the National Committee on Safety Appliances at the last general convention of the Railroad Commissioners of the United States that was held here in Washington on the 4th of last March. Under a resolution the convention provided that the committee should give a hearing to railroad companies and to accredited representatives of labor organizations, with a view of framing a bill and submitting it to Congress as soon after its opening session this year as possible, to compel the adoption of an automatic safety car coupler and certain other things, namely, the compelling of the

equipment of engines with driving brake and certain other matters that are not so important. At least I will not speak of them at present.

I do not know how familiar the various members of this committee may be with the car-coupling question. I, therefore, in a few words, will rehearse to you briefly the situation in the United States to-day. In consequence of the large number of employees of railroads who are injured or killed in this dangerous occupation the subject was taken up by the various State legislatures, beginning about ten years ago by the passage of laws in the different States requiring railroad companies within the respective States to equip their cars with an automatic coupler. Massachusetts was one; New York was another; and so far as New York is concerned I am very familiar with what *took place. Acts were passed compelling the adoption of one of* several couplers. A time was set within which the corporations were to conform to this act. The result was that one railroad would adopt one coupler, another would adopt another coupler, and the result was confusion confounded. In consequence of the interchange of cars from one State to another the fact was soon developed that a car coming from Ohio into New York equipped with one coupler would not couple with the coupler that had been adopted by the railroad that it found in the State of New York, and thus the dangers became greater.

The CHAIRMAN. Greater injuries were inflicted?

Mr. RODGERS. Yes, sir. The railroad commission of the State of New York eight years ago, in hopes of clearing up the situation somewhat, gave widespread advertisement to the fact that upon June 6, as I remember the date, it would make an investigation and trial of different car couplers then in use. I conducted that investigation myself. There was a vast number of cars, equipped with different devices, at the yard of the New York Central Railroad in Albany, and we spent two days in making a test of the merits of the different couplers.

The result was that a careful report was made, setting forth, in the opinion of the board, what coupler was the best. The board then thought that on the whole it would be better to adopt a coupler which would couple automatically with the old link and pin; and with that idea in view it recommended as its first choice a device which would couple automatically with the old link and pin, provided there was a "chop," as it is technically called, in the drawhead to prevent the link from going back.

Senator HARRIS. What board was that?

Mr. RODGERS. The board of State railroad commissioners.

The State commission of Massachusetts took the same action, and they recommended other couplers. The result was that there was very little improvement in the conditions. The recommendations of the board were not compulsory. Indeed, we did not desire that they should be, and the railroad corporations went on adopting first some one and some the other.

Finally, the Master Car Builders' Association, which I presume you are familiar with, which consists of delegations of master car builders from the different railroad corporations in the United States, in which each corporation or representative is given a vote proportioned to the number of freight cars in the company which he represents—

and consequently it is a pretty fair test of the opinion of the railroad corporations as to any device which the association adopts—shortly after this trial that I alluded to in Albany, adoped a resolution to the effect that what is termed the "vertical-plane" coupler made, in its opinion, the best coupler.

The vertical-plane coupler, I may say in a word, for the benefit of those who may not be familiar with the facts, consists in a hook coupler with knuckles, which go together somewhat in the way of the hand, and, in fact——

The CHAIRMAN. We have had a model here.

Mr. RODGERS. I did not know how familiar you were with it.

Senator HIGGINS. Some of us know nothing about it.

Mr. RODGERS. The Master Car Builders' Association, after having had a number of tests, after having had this vertical-plane coupler placed upon a large number of cars in the United States, thus securing a practical test of its efficiency, reached the conclusion that the Master Car Builders' type was the best type.

The CHAIRMAN. Is that a patent?

Mr. RODGERS. No, sir; the type is not. There are a large number of patents upon the type, depending upon the manner in which the knuckle is closed and held in position, but the general method of closing is not a patent.

Senator HIGGINS. Nor patentable?

Mr. RODGERS. That I do not know; but I am safe to say, am I not, Mr. Ely, that the type is not patented, but whether it be patentable or not, I do not know. I suppose not.

Mr. ELY. Oh, no; it is not.

Mr. RODGERS. I will give the advantages claimed in a word. I am not going now into the respective merits of the various types, unless you desire to hear it. I am familiar with them, and will do so if you wish.

I merely wish to say that these people, the master car-builders and others, for that matter, who are better able to judge than anybody else, reached that conclusion. The direct advantages of them, these couplers, I may mention, are these: They make a fast coupling, so that when the train starts the only slack given is that due to the spring in the drawhead, whereas the old link-and-pin coupler, as one car was started, of course there was much greater slack, and it was very apt to snap the link.

Previous to the test of brakes at Burlington it was supposed that a heavy freight train could not be started without this slack. It was a strong argument in favor of the link-and-pin coupler. But in consequence of this brake test in Burlington it was developed that the spring in the drawhead was sufficient to admit one car being started after the other in succession, even if it was only an inch. The inertia was overcome and the train would be moved along.

Now, there is a very great advantage in that, because it admits better of power brakes being used. When the automatic coupler is used there is a fast coupling. With the old link-and-pin coupler it was so long that it was very liable to be broken. So the adoption of the Master Car Builders' type carries with it very much greater practicability of adapting the air brake also.

Then after the adoption of the resolution by the Master Car Build-

ers' Association, one after another of the railroad corporations of the United States wheeled into line, and reached the conclusion that the Master Car Builders' type was the most practicable one, and they determined to adopt it.

After this committee was appointed at the last meeting of the Railroad Commissioners of the United States, of which I am a member, it held a hearing, issued circulars to various railroad companies and bodies of organized railroad employees throughout the United States, inviting them to appear before it on the 10th day of November last, in the chamber of commerce in New York. It also called for a variety of information, and a great amount of this information was gathered and put in shape by Mr. Moseley, the secretary of the Interstate Commerce Commission, who acted as the secretary of our committee. On your thumb nail, the result of this information was that there were about a million freight cars in the United States; that there were about 160,000 miles of railroad, of which 125,000 approved of the Master Car Builders' type. At the hearing before the committee in the chamber of commerce there were representatives from a large number of railroad companies; also from a large number of organizations of employees of the railroads of the United States. At that meeting, also, there appeared a committee representing the American Railway Association, which is an organization of railroads representing 125,000 miles of railroad in the United States, which committee, of which Colonel Hains is chairman, and there is a member of it here now, Mr. Ely, of the Pennsylvania Railroad, expressed their approval of the Master Car Builders' type as against any other type. There was some opposition at that meeting to the Master Car Builders' type, but I think it was restricted to the upper part of New England, and came from the Boston and Maine Railroad.

The CHAIRMAN. The committee will now take a recess until 1.30.

Thereupon, at 12 o'clock m., the committee took a recess until 1.30 p. m. At the expiration of the recess the committee resumed its session.

Mr. RODGERS. Mr. Chairman and gentlemen, at the time of the recess I was just at a point in the narration of the situation where the committee had been appointed by the convention of the railroad commissioners of the United States, and had issued their circular calling for information, that the information had been received and compiled into shape by Mr. Moseley, secretary of the Interstate Commerce Commission. As I say, at the hearing that was had in the Chamber of Commerce on the 10th day of November before this committee on safety appliances the representatives of the railway association appeared and expressed themselves as in favor of the master car builders' type—not of any particular patent, but of the master car builders' type.

Senator HARRIS. Is that an association of railroad companies or of constructors?

Mr. RODGERS. Of railroad companies. The American Railway Association is the successor of the time convention. That was an association of the representatives of railroad companies, with a view to formulating rules for the operation of trains, for the management of cars, and such other matters as required the concurrent action of the railroad companies.

This association, or its representatives, appeared before the com-

mittee and approved of the master car builders' type of coupler, but deprecated any legislation upon the subject on the ground, first, that they were equipping their cars as fast as they could, and, secondly, that the coupler had not been perfected to the extent to justify compulsory legislation at this time.

At that meeting there were people representing other interests, notably a delegation from what is known as the Switchmen's Union, which comprises in its membership a large number of people engaged in the practical coupling of cars. These gentlemen, or their representatives, to the astonishment of the committee, professed a disinclination to the adoption of any automatic coupler. Upon close questioning, however, it appeared that their disinclination resulted from the dangers incident to the transition period; that while there was a coupler of one shape, and another of another shape, and another of another, the difficulties of coupling were greater than with the old link-and-pin coupler. It was also stated to the committee in a semi-private way, which I say publicly, that part of this opposition, a feature of it, was that these men feared that if an automatic coupler were adopted there would be less demand for the expert services incident to the coupling of cars than at present. How much weight there is in that I do not know.

Senator WILSON. From what source did that objection come?

Mr. RODGERS. From the representatives of the Switchmen's Association of the United States, which is an organization of men engaged in this dangerous occupation; and, as I say, upon close questioning, and the testimony, which I suppose is before you, will show——

Mr. MOSELEY. The committee have it all.

Mr. RODGERS. This fact was elicited. However, if an automatic uniform coupler was adopted and put into universal use, they admitted that the dangers incident to coupling would be reduced very much, if not to an absolute nullity.

Then, after the committee heard these various views expressed, it had a meeting at the Astor House with a view of formulating a bill to be presented to this Congress in conformity with the resolution creating the committee. Unfortunately the chairman of the committee, Mr. Crocker, had not reached a conclusion that was satisfactory to himself, and the committee adjourned on the night of November 11 without formulating a bill.

The CHAIRMAN. November 11, 1891?

Mr. RODGERS. Yes, sir; November 11, 1891. Thirty days elapsed, and I saw in the newspapers that the chairman of this committee had introduced a bill, which, in my opinion, was open to some objection, and I wrote to him requesting that the bill be not reported until the committee on safety appliances, of which I am a member, had had an opportunity to appear, or to agree upon a bill and present its views. Thirty days more elapsed and the committee was not called together. No bill was offered except one from Mr. Smith, of Iowa.

The CHAIRMAN. You mean your committee?

Mr. RODGERS. Yes, sir; the committee on safety appliances. No bill was presented except the one of Mr. Smith, of Iowa, and the one I presented for the consideration of the committee.

It seemed to me that the time had come when our committee, or some member of it, should present the result, at all events, of the investigations of the committee, and with that idea in view I trans-

mitted to the chairman of this committee my views embodied in a bill which he introduced in the Senate, and which is to be found on the files. It is the second bill from the last on your files, namely, Senate bill 1618, to promote the safety of employees and travelers by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving-wheel brakes. It is proper that I should say that the bill represents my personal views as a member of the committee, not the views of the committee, because they have not as yet expressed any views. The bill represents my personal views, resulting from the investigations of the committee and my previous investigation and trials in the matter.

Now, I shall invite your attention for a moment to the consideration of that bill. It is short; it certainly has that merit. It provides in its first section that after January 1, 1897, no common carrier shall haul, or permit to be hauled, any freight car engaged in interstate commerce unless such car shall be equipped with automatic couplers, so constructed as to couple by impact with the next car without the necessity of a person going between the cars, and so constructed as to be uncoupled without the necessity of a person going in between.

The next section provides that no common carrier shall haul, or permit to be hauled, any car after January 1, 1897, unless that car is equipped with brakes that can be set and unset at any time from the locomotive hauling the train on which the car is.

The third section provides that locomotives shall be equipped with driving-wheel brakes; and a proviso is inserted that it shall be lawful, in case of accident or other emergency, to temporarily dispense with the use of automatic couplers, or continuous brakes, or driving-wheel brakes.

The fourth section provides that any carrier violating any provisions of the act shall be liable to a penalty of $100 for each and every violation, to be recovered in a suit to be brought in the district court of the United States having jurisdiction in the locality where the violation shall have been committed by the United States district attorney of such locality, and it is the duty of the district attorney to bring such suit upon duly verified information being lodged with him of such violation having occurred.

The fifth section gives the Interstate Commission in special cases the power to extend the time for compliance with the provisions of the act for a period not exceeding two years.

The bill is modeled upon the statute in existence in the State of New York in regard to the same subject.

The CHAIRMAN. If that bill were adopted and became a law would this danger, which now exists on account of the variety of couplers, be avoided?

Mr. RODGERS. I think it would be avoided for this reason: While the bill does not specify what the coupler shall be, the theory upon which the bill is drawn is that the Master Car Builders' type has proved itself by the law of the survival of the fittest to be the one that will be adopted.

Senator HARRIS. About how many automatic couplers have been invented?

Mr. RODGERS. The name is legion.

Mr. ELY. There are 7,000 patents. I think there are about 10,000 of these devices.

Senator HARRIS. About what proportion of the cars are now equipped with automatic couplers?

Mr. RODGERS. The statistics developed by the circulars of the committee show that of the Janney type there are 40,231; of the Gould, 23,357; of the Hinson, 42,061; and those of the Master Car Builders' type, not otherwise designated, 13,279; making a total of 118,928.

Senator CHANDLER. Cars?

Mr. RODGERS. Yes, sir.

The CHAIRMAN. Is there any difficulty in having those couple together so as to avoid this danger which occurs from using different kinds of couplers?

Mr. RODGERS. No, sir. Among the Master Car Builders' type each one of these couplers will couple with any other of the same kind of type.

Senator HARRIS. There are 118,000 cars equipped with couplers of the Master Car Builders' type?

Mr. RODGERS. Exactly.

Senator HARRIS. What proportion is that to the number of freight cars in use at this time?

Mr. RODGERS. There are 978,161 freight cars. In round numbers it is about 12 per cent.

Now, it may be proper to say that the idea occurred to attempt to legislate into existence a specific type of couplers, namely, the Master Car Builders' type, to define it in terms. There are a good many practical difficulties about that, and there were many objections to it, and it seemed to me, and it seemed best to those with whom I have conferred upon the subject—and there have been a great many people with whom I have conferred—to simply provide in the bill that the car should couple and uncouple by impact automatically, and that it would carry with it, in consequence of the start that the Master Car Builders have over all others, the final adoption of the Master Car Builders' type.

Now, I think it is clear that if any legislation upon this subject is enacted it ought to be——

The CHAIRMAN. I will ask you whether, in your opinion, it is or is not best to pass any law on the subject? I ask that question because many argue that it is best not to enact any legislation, many railroad men more especially, perhaps.

Mr. RODGERS. I think there is a fair opportunity for a difference of opinion there, but my opinion is that a bill can be enacted without doing harm and which will do good; that on the whole the balance in the way of expediency is in favor of the enactment of a bill of this kind rather than to let the matter go; and briefly for this reason: There is a number of progressive companies in the United States who are equipping their cars with automatic couplers as fast as they can do so. These companies deprecate legislation on the subject for the reason that they say they are doing as well as they can anyhow, and legislation is only in the way of a spur that will be annoying without being beneficial. And there are a great many other corporations who are not progressive, and who are not doing any-

thing, and who will not until they are compelled to. It has been admitted that such is the fact.

The CHAIRMAN. They have run along on the old link-and-pin arrangement?

Mr. RODGERS. Yes, sir.

Senator HARRIS. Is it or is it not true as a general rule, that railroad companies, under their responsibility at common law, which requires them to use the best appliances that can be used, are adopting the best couplers, as well as the best appliances of every other description, as rapidly as in the nature of things they can?

Mr. RODGERS. I do not think they are.

Now, you might say with regard to the steam-heating of cars that they would have gone on and adopted some other method of heating their cars than by having stoves in the cars without compulsory legislation. In point of fact they do not; and it was not until the State of New York, followed by other States, enacted compulsory legislation upon that subject that the railroad companies adopted steam heating. Now they are adopting it very rapidly. All over the State of New York they have adopted it, and a large majority of the trunk lines in the State have adopted it because they could not get their cars in the State without it.

One word with regard to the merits of the Master Car Builders' type as against any others. I will not take up your time by going into a dissertation of the mechanical features of the Master Car Builders' type as compared with others, but I am satisfied that if this bill is enacted into law the Master Car Builders' will be adopted, because it has the start so much beyond any other that no other one can hope to catch up, and if this bill is enacted into law I believe that railroad companies will be constrained to pay attention to the operation of the details of this coupler in a way that if there was not any compulsory legislation they would not do.

The CHAIRMAN. Suppose your bill, Senate bill 1618, were passed and becomes a law. Will there be, under any circumstances, any necessity for a switchman to go between the cars at all in order to couple or uncouple the cars?

Mr RODGERS. If they adopt the Master Car Builders' type there will not be. The law provides that there shall not be. They have to adopt a coupler with such details that it will not. That is put in in terms.

The CHAIRMAN. That bill does not say the "Master Car Builders' type," as I remember it, but it says "an automatic coupler."

Mr. RODGERS. Yes, sir.

The CHAIRMAN. Now, if the technical provisions of that law are preserved, the railroads in all cases will be required to provide such a coupler as will obviate the necessity of the switchman going between the cars?

Mr. RODGERS. They will; that is in special phraseology:

> Shall be equipped with automatic couplers so constructed as to couple by impact with the next car without the necessity of a person going between the cars, and so constructed as to be uncoupled without the necessity of a person going between the cars.

Senator CHANDLER. What is the objection to requiring a person to go between the cars to uncouple them? Where is the danger in uncoupling?

Mr. RODGERS. Very little. If a man is between the cars and there is a movement of the train or something of that sort it would be dangerous, possibly, to be in between. There is a number of devices that enable this uncoupling to take place from the side of the car, and it is better that it should be. I want to anticipate an objection here. In a number of these types there are devices on the side of the car by which the knuckle can be opened when the cars are apart, so that switchmen need not go between the cars, never mind how far they are apart. Of course if the cars are a considerable distance apart and are not moving there is no particular danger. He goes in and opens the knuckle with his hand.

Many of the couplers are so constructed, and there is no objection to that. This phraseology might even prevent him from doing that. That could be altered by saying without the necessity of a person going between the cars when they are within such a distance of each other, say 10 feet of each other, which might meet that objection. But there is a number of couplers where you do not have to go between the cars at all—where they can be opened, as I say, by a device on the side.

Now I wish to say a word here. I do not think that it is a desirable thing to enact any legislation looking to the creation of a commission—I do not care how it is composed—that will adopt any specific form of coupler. I say this for the reason that the railroad companies now of their own free will and accord have come nearer to an agreement upon this matter than they are likely ever to come again.

One hundred and twenty-five thousand miles out of 160,000 are in favor of it. The switchmen, a large body of organized laborers, are also in favor of it. Mr. Coffin here represents an organization called the Brotherhood of Railroad Trainmen, which organization represents 175,000——

Mr. COFFIN. No, not in that. There are 122,000 in that organization.

Mr. RODGERS. It embodies a large number of men who are in favor of this, and an enormous preponderance of those interested, whether employees or railroad companies, are in favor of this Master Car Builders' type, and I have no doubt whatever that legislation, such as is indicated in this bill, No. 1618, will, if enacted, adopt that type. Yet it gives elasticity, it gives railroad companies an opportunity to perfect the details. It does not stereotype anything, and from every point of view that I have investigated the matter, it seems to me that a bill such as I have presented here is the least objectionable from the point of view of the railroad companies, and likely to be most efficacious from the point of view of the trainmen.

The CHAIRMAN. I want to say that the first bill I introduced was more to get the subject before this committee and to draw out expressions from various interests connected with railroading, so as to arrive at what was the best thing to do if we decided to report anything.

Mr. MOSELEY. I would like to call Mr. Rodgers's attention to a statement he makes, and that is with reference to compiling these statistics which he has obtained from the replies to the inquires sent out to railroads, that but seventeen roads representing but 11,915 miles have expressed themselves in favor of the Master Car Builders' type.

Mr. RODGERS. That is true so far as our circulars are concerned. My statement was based upon the statement before the committee, of

Colonel Haines and Mr. Ely, representing the Railroad Association of the United States, which appeared before the committee at that hearing, and represented themselves as representing 125,000 miles. Is not that true, Mr. Ely?

Mr. ELY. I do not remember.

Mr. MOSELEY. I never knew that the railroads, representing 125,000 miles of road, have expressed any opinion in regard to the matter, and the only opinion I ever knew was the one which is here.

Mr. RODGERS. That is so, so far as those statistics are concerned. My statement is based upon the statement of Colonel Haines, who represented the Railroad Association of the United States before our committee, and which association was in favor of the adoption of the Master Car Builders' type. I think Mr. Coffin was there.

Mr. MOSELEY. One hundred and twenty-five thousand miles of road were the only ones that replied to the circular of the Commission, and of that but 11,900 stated that they were in favor of the Master Car Builders' type.

Mr. RODGERS. That is true, Mr. Moseley. I repeat that Colonel Haines, representing that large organization, represented that they expressed themselves in favor of the Master Car Builders' type, but refused to recommend compulsory legislation for the reason I have given, and the number of miles I have represented was 125,000.

I think I have indicated and expressed, so far as I can think of them, the reasons why it seems to me if any bill at all is adopted it should be such a one as is to be found in Senate bill 1618.

Senator JONES. If it is not out of order, I would like to have the balance of Mr. Moseley's statement. He stated that he sent out circulars to 125,000 miles of railroad, and only about 11,000 expressed themselves in favor of the Master Car Builders' type. I would like to ask him the question as to whether any of these 125,000 miles of railroad expressed themselves against it?

STATEMENT OF EDWARD A. MOSELEY.

Mr. MOSELEY. In answer to the Senator, I desire to state that under the direction of this committee a circular was sent to every railroad in the United States. Railroads of 125,000 miles out of a total mileage of over 160,000 miles in the United States answered.

Of these roads, as to the question of the best means of bringing about uniformity in safety car couplers, 69 roads, representing 13,000 miles, are in favor of national legislation. Eighty-eight roads, representing 46,791 miles of road operated, are in favor of voluntary action by the railroads.

The CHAIRMAN. And against any legislation?

Mr. MOSELEY. Yes, sir; we so understand it. Two roads, representing 139 miles, want State legislation. Seventeen roads, representing 11,915 miles, are in favor of the Master Car Builders' type of coupler. Ten roads, representing 4,829 miles, are in favor of different couplers—so many that I have not classified them. Fifteen roads, representing 9,447 miles, expressed the opinion that the matter is still in an experimental stage, while 145 roads, representing 38,985 miles, have expressed no opinion in regard to the best means of bringing about uniformity in automatic couplers. The Atchison, Topeka

and Santa Fe Railway Company and its auxiliary lines, together with one other road, express themselves in favor of what is known as the Safford coupler.

I want to say, Mr. Chairman and gentlemen, that the members of the committee appointed by the National Convention of Railroad Commissioners, of which Mr. Crocker is chairman, are, for various reasons, unable to attend this meeting. Mr. Crocker, however, has called a meeting to take place on next Tuesday in advance of another hearing which I understand this committee will give them on the following day. At that time there will also be present the committee sent by resolution from the Massachusetts legislature to call the attention of this committee and Congress to the subject. I have also, as secretary of the committee of the national convention, called the attention of all the persons whom I could reach who are at the heads of the various organizations of railroad employees, and other persons interested, that they may be present at the meeting next Wednesday. It is the hope of Mr. Crocker that his committee may be able to unite in some action.

Some five years ago, while in the Massachusetts legislature, my attention was called to the manner of safety appliances. A short time after the organization of the Interstate Commerce Commission, under the direction of the chairman, Judge Cooley, who was fully impressed with the importance of the subject, an investigation was made. At that time I believe it was Judge Cooley's idea, and my own also, that the matter was one which could be very easily legislated upon and adjusted. As time has gone on, however, I believe his opinion has very much changed in regard to the matter, and certainly mine has.

I am now speaking not as secretary of any committee, but as a citizen who has paid a great deal of attention to the matter. It is not an easy subject to deal with; there are such great differences of opinion. There is a great difference of opinion among the very men to whose advantage the proposed legislation would inure. The railroad employee, particularly the one who belongs to an organization, has not only his own personal risk to consider, his sympathy appealed to by the loss or injury of a fellow-employee, but he has also a pecuniary interest in the matter, as out of his wages he is called upon to contribute to the relief of those of his organization who may be injured or killed in this service.

At the meeting in New York, Mr. Sweeney, Mr. Hall, and others of the Switchmen's Mutual Aid Association, who are distinctively representative men, and as much so as any other gentlemen who were there, stated that they were opposed to the Master Car Builders' type of coupler, and that the risk was increased by the use of them. I think, as Mr. Rodgers has stated, that the reason of this feeling is largely the difficulty of coupling cars which have different kinds of appliances. I think it far better to have the old and existing state of affairs, the link and pin, than to have a certain number of cars throughout the United States with one kind of coupler and others with another.

Cars are not confined to the particular road for which they are built, but they go all over the United States, and carry disaster into every freight yard they enter in the attempt to couple them with the

old link and pin, while they may work automatically and perfectly with a coupler of their own make.

There are 1,000,000 or more cars in the United States to-day. About 190,000 have some particular safety device; the others have the old link-and-pin couplers. These 190,000 cars are the means, according to my observation, of bringing a great deal of death and injury to the men who are employed in the service. It is far better to retain the old link and pin than it is to allow cars to leave one road and pass from State to State and go across the country equipped with some device which, while it may work perfectly with similar devices, when it encounters the old link and pin and other kinds of couplers, is very dangerous from the difficulty experienced in coupling the cars.

It would appear to me that a question to which the President has three times called attention, a question to which legislatures are now directing their attention, and a question which has been before this committee repeatedly, is in such a state that some legislation should be had. Any legislation which allows any road to put on any coupler it believes is going to meet the requirements of a law is not going to remedy the evil. Therefore, it seems to me that legislation which would create a board to be appointed by the President to investigate this entire subject, with power to call upon the inventors of safety coupler appliances (of which Mr. Ely states there are 7,000) to bring before them their couplers, having sufficient means to make practical tests, and at an early date report to Congress the result of their investigation with a view to such legislation as might be found necessary and convenient, would be the wisest and safest course to pursue.

STATEMENT OF THEO. N. ELY, GENERAL SUPERINTENDENT MOTIVE POWER, PENNSYLVANIA RAILROAD.

Mr. ELY. Mr. Chairman and gentlemen of the committee, I do not desire to make any extended remarks, but should be glad to be of any assistance that I can to the committee in solving this problem.

Possibly I had better call it "reporting progress," as I was here two years ago on a similar errand, the result of which was printed as part of the hearings of this committee.

We are always glad to know that our predictions have come to pass. In this instance the statistics, which I will give you, will indicate that my prophesy that railroads would proceed without compulsion has been fulfilled, although I have not been able, in the short time at my command, to gather as complete information as I should have liked.

Before going further I would explain that I am not here as one opposed to anything that will better the situation.

The CHAIRMAN. Will you be kind enough to state what your relation is? Are you connected with the Pennsylvania Railroad?

Mr. ELY. I have charge of the rolling and floating equipment and kindred matters of the Pennsylvania road. This road has of its own volition put on a great many more couplers and air brakes than even a radical law would require; including cars under contract, about 25,000 couplers and 20,000 air brakes have been applied.

In the first place, our aim is to reduce casualties as far as possible; and, in the second place, we think there will be an economy of operation in the use of something better than the pin and link.

I desire to be considered as one believing in the application of automatic couplers, and hope that this will be kept in mind in listening to what I may say.

The President called attention to this subject two or three years ago, and the American Railway Association deemed it advisable to appoint a committee of its members to inquire into the very things about which you are now seeking information. This committee is called the committee on safety appliances, of which I have been a member since its appointment.

I am not here in that capacity, and only mention the fact to explain that I have in this way been able to obtain information as to the progress actually made in the introduction of automatic couplers on freight cars, commencing with the year 1887.

Less than one hundred roads and some twenty private lines, representing about 70,000 miles, have reported that in 1887 (about the time the Master Car Builders' coupler was introduced) they had 6,400 cars fitted; in 1888, 11,000 cars; in 1889, 22,000 cars; in 1890, 48,000 cars; in 1891, 83,000 cars; in 1892, 132,000 cars; and, in addition, that they have put on and contracted for 27,000 cars since January 1, 1892, all to be supplied with automatic couplers. These figures denote the relative progress, and must not be mistaken as representing the total number of couplers in use, which total would be largely in excess of the figures given.

This increase, from 6,400 to 132,000, should be very convincing that the railroads are in earnest.

The CHAIRMAN. I want to ask you here what roads have made the most progress in this work of adopting automatic car couplers?

Mr. ELY. The trunk lines, principally. My time was so short that I only brought the totals with me, thinking it would be of interest to you to see how, from 1887 until 1892, even these few roads have increased from 6,400 to about 132,000 and have ordered 27,000 more.

The CHAIRMAN. What is your impression as to the other roads that have not reported; do you think they have done anything, or have they done much?

Mr. ELY. Yes, sir; I think many of them have.

At the other hearing, two years ago, a question was asked to the effect, Would it not be of advantage to the roads then applying couplers to have a whip used to drive into the fold those that had shown no inclination to act? The answer at that time was that we felt the moral effect of the larger roads would be sufficient.

It must be remembered that the automatic coupler was not a very well-defined thing four or five years ago, and many of the ideas about it were crude. Many defects of a dangerous nature have developed from time to time; the question of safety demands that each step should be carefully considered, especially as the effects of wear can be learned only by actual service. So that on the whole it seems to me, judging from experience in the introduction of other appliances, that the progress has been phenomenal.

About a dozen manufacturers of the Master Car Builders' type of couplers report their present capacity and general output as about 30,000 couplers per month.

The CHAIRMAN. Their capacity could be gauged according to their necessity without much trouble?

Mr. ELY. Yes, sir; of course they would increase their capacity to meet the demands.

Senator JONES. You say they are selling 30,000 monthly?

Mr. ELY. Yes, sir; and they say at ten days' notice they can increase their capacity to 40,000.

This shows a remarkable and phenomenal progress, both in the large amount of money that has been invested by the manufacturers and in the fact that while four or five years ago there was but one coupler that was promising, there are now at least five or six.

The CHAIRMAN. You are opposed to any legislation on the subject?

Mr. ELY. Yes, sir; but I do not like to say that too broadly. I am opposed to it because I think it will do harm and hinder development. If it would do any good I would be heartily in favor of it.

The CHAIRMAN. Your view is that it would not do any good?

Mr. ELY. It is. I do not believe we should make a law only because we do not know what else to do. The railroads have certainly shown great energy without law.

The CHAIRMAN. A great many people are being injured.

Mr. ELY. A great many; undoubtedly so; and we are all, the railroads as well as others, striving, in the cause of humanity, to do away with entirely, or at least reduce these casualties to the minimum; this is the only fair basis upon which to discuss the question. Will you permit me to ask that, in reviewing the statements which will be made, you will carefully consider the opportunity those who will testify before you have had for forming opinions of value? In other words, that theory be not regarded as of equal weight wth experience. We must not take a leap in the dark, and in my opinion every bill I have read (I have only to-day read the one referred to by Mr. Rodgers) would be the equivalent of so doing. Mr. Rodgers's bill, which happens to lie before me, says that couplers must be such that they will couple by impact, etc. Under it may not five hundred or more kinds of couplers be used?

The bill does not specify the Master Car Builders' or other type. The commission of Massachusetts at one time approved five couplers; these five would not couple with each other, and great confusion resulted. There is to-day a difference of opinion as to whether the Master Car Builders' type is really the best type. There are some roads in this country that declare themselves against it.

Suppose this bill should become a law. The latter could, and probably would, equip their cars with couplers of the link-and-pin type, and the other roads would at the same time be putting on the Master Car Builders' type. If the law is to be valuable, and to be of the service which it is intended to be, it must be such a law as will require that uniform couplers be used.

The CHAIRMAN. Do you not think that Mr Rodgers's bill, which he has commented upon here, would require a unform coupler?

Mr. ELY. Not by any means—far from it. Fifty or more different types of couplers could be used under that bill.

Senator JONES. Has experience shown that the use of the automatic coupler has greatly reduced the percentage of casualties on the road?

Mr. ELY. Not as yet. It has been said, on the contrary, that it has increased them largely. This may be so to some extent, but I

think not to such an extent as is imagined. Of course, when two things are not alike a man must hesitate a moment to see how they will go together. But there are so many of the Master Car Builders' couplers in use to-day, and so many of the old form, that men have come to know how to couple them together.

As said before, I am not here to oppose anything that will bring about a better state of affairs, but rather to point out the unwisdom of any bill I have seen or can imagine——

The CHAIRMAN. Could you get up a bill that would bring about a proper state of things, by which the railroads would be required to use one particular device and still would result in benefit finally to the service?

Mr. ELY. I could not. I do not hesitate to say this, for the reason that I have given much thought to the subject of late.

The CHAIRMAN. Then there is no bill yet that you have seen or been able to put in form yourself that you think would be an advantage to these people in protecting them from being killed or injured?

Mr. ELY. No, sir; I do not know of any, and I have not been able to devise one myself.

I do not know how familiar the committee is with what has been done by the Board of Trade of England, which has been in existence fifty-odd years. Although originally their principal duty was the regulation of rates and other traffic matters, they found themselves confronted a few years ago with just the character of work that is now before this committee. The board of trade appointed their inspectors from the Royal Engineers. They did not have authority to enforce their recommendations, but could call for men and things, and were not restricted in their investigations. The inspectors report to the board of trade, and the board of trade to Parliament as to their recommendations.

After an existence of forty years this is what a prominent member, Mr. Farrer, said:

(1) The railway companies have no right to object to any interference requisite for securing the public safety. They have a monopoly on public traffic, and are bound to do whatever is necessary for that object.

(2) Nor is it necessary to argue that railway administration is perfect. It may be admitted that, though their business is in general well and ably conducted, they are sometimes poor, sometimes niggardly, sometimes slow, and sometimes obstinate. Railway companies have also some of the defects of public departments in the size and cumbrous character of their official machinery and in the remoteness of the bearing of the important motive of self-interest in the directors and managing officers.

(5) But after all these admissions, general interference with the administration of railways is objectionable on the following grounds:

(6) By such interference you are setting two people to do the work of one. Double management is notoriously inefficient. One bad general is better than two good ones.

(7) You set those who have less experience of management and less personal interest in the result to control those who have more.

(8) Control is either apt to become formal and a sham, or if zealously and honestly exercised, to be rigid, embarrassing, and a hindrance to improvement.

(9) Many excellent things, the adoption of which is desirable for public safety, e. g., the block system interlocking points and signals, efficient brakes, properly constructed ties, are not things which can be once for all settled, defined, and prescribed, but things of gradual growth, invention, and improvement. Had any of them been prescribed by law at any time past they would probably not have been what they are now, and were they now prescribed and defined by law future improvements would be checked.

This is a most insiduous form of evil, for we do not know the good which we thus prevent. It is no answer to say that Government control would be intelligent, and would encourage improvement. It is not Government or its officers who invent and adopt inventions, and those who do so are far less likely to improve when Parliament or Government has defined and prescribed a definite course, the adoption of which frees them from responsibility.

(12) Lastly, it is impossible to maintain at the same time any general system of Government control, and any effectual responsibility on the part of the companies. At present the companies are responsible to public opinion and to Parliament before which they have constantly to appear, and they are under heavy liabilities for accident and danger in courts of law. Once admit Government control and these liabilities are at an end. No one can find fault with a company for that which the Government has sanctioned. With a system of control, even Government inquiry will be useless, for the Government officers would be inquiring into their own acts.

(15) It is scarcely necessary to add that the reasons against Government control which are above advocated are entirely consistent with a thorough system of Government inspection and investigation. The function of throwing light on all parts of the railway system, of investigating all alleged dangers, whether accidents have happened or not, and of ascertaining the true cause of accidents which do happen, is one which the Government can exercise with the utmost possible advantage and without fear of dangerous results. It is one which is useful to the companies, for it points out to them real sources of danger, and relieves the public mind where there is unfounded apprehension of danger. It brings to bear on the companies the powerful motives of fear of public opinion, of Parliamentary pressure, of apprehension of loss of traffic, and of legal liability for damages. And it does this without ulterior ill consequences.

The consequences that I am afraid would follow.

It is because these forms of remedy are in reality of very great efficacy, and because they are not inconsistent with Government control, that I depreciate the latter.

This report was made at a time when Parliament had under consideration the advisability of giving this board of inspection authority to regulate safety appliances. Their opinion, as seen, was that they should not be given such authority.

Mr. Farrar has given this carefully prepared opinion after years of experience, and I can not refrain from calling your attention to it and asking for it your most careful consideration.

The CHAIRMAN. We want to find out what we ought to do in the premises.

Mr. ELY. Or rather ought not to do. It is possible that a carefully selected committee might be appointed, as indicated by Mr. Moseley a moment ago, to look into the subject and report as to what, if anything, it thinks should be done, not as to couplers alone, but also as to the broad question whether action by Congress is advisable or necessary.

The CHAIRMAN. If there is going to be any inside action by organizations it should be taken very soon. We can not have this subject hanging along here all through the session. We must come to a conclusion about it one way or the other.

Mr. ELY. I do not mean a committee to report to you now; I mean at some future time. I think you are pretty well convinced that there is a great deal of progress being made.

The CHAIRMAN. The only question is whether there is progress enough. As far as I am personally concerned, I would much rather the common carriers would go on and do this without any legislation; but if they are not going to do it, and in the meantime hundreds and thousands of people are maimed and killed every year, if there is

anything that Congress can constitutionally do it ought to do it in order to hasten the stopping of such a situation.

Mr. ELY. There is no doubt of that at all, and of course deaths and injuries will decrease following the adoption of a uniform coupler. I say again, be careful lest you make matters worse than they now are. There is one thing certain—that a reduction in force will follow the introduction of a uniform self-coupler, and casualties will be proportionally less.

Senator HARRIS. What extent will the adoption of the automatic coupler probably reduce the force?

Mr. ELY. It is very difficult to answer except in a general way. It will be principally in railroad yards. It has been the favorite idea of our vice-president, Mr. Thomson, that it will some day be found advisable to classify railroads as to their physical conditions. This would be the first great step in the problem of safety on railroads. All this points to the appointment of some permament commission to come between the Government and the railroads.

In conclusion, I wish to repeat, that in my judgment any bill drawn that I have seen will in the end do more harm than good at this stage of the situation.

STATEMENT OF MR. THOMAS L. GREENE.

Mr. GREENE. I have here the statistics of the railroad accidents in Great Britain. I will say that I have no interest in the matter other than that of a public writer and student of the question, and I have had in that a great interest for a number of years.

The point I wish to make is in reference to the statistics of railroads as printed in the last annual report, printed in the advance copy which I have here.

I was present at the meeting spoken of by Mr. Rodgers in November last, and have been watching the subject with great interest, studying statistics when brought up. The point I wish to make is that the statistics here are not conclusive as to the kind of legislation which is needed. I am sure the committee will acquit me of any wish to say anything at all against safety appliances where human life or limbs are in jeopardy; if there is anything to be done or can be done to get rid of accidents of that description, I am sure I am with you.

But the statistician makes this remark:

> No statement has yet been gathered of the proportion of casualties that might have been avoided if all cars were supplied with train brakes or automatic couplers.

The CHAIRMAN. That is the Commission's report.

Mr. GREENE. Yes, sir. I am quoting from page 76.

What I would bring before you is that this is literally true, because his own statistics, which are given in percentages on page 82, seem to be open to this objection, that the question of the automatic coupler is not carried out in such a way in this table as to form any basis as to what injury is caused by the link-and-pin coupler. My own impression upon that point from my experience in railroad affairs is that the actual form of the coupler has not killed and injured as many men as the popular impression indicates, and I have prepared here a little table which I can leave with you which is compared with what has been done in Great Britain.

The CHAIRMAN. To what other causes would you attribute the injuries in that table?

Mr. GREENE. I will give it, if the committee please, in a moment. In this official report of all the accidents which have occurred to railway servants in Great Britain in 1890, which is the latest we have, 30 per cent of the killed among the employees are put down as owing to "walking, crossing, or standing on the track while on duty." I think every railroad man must admit that a very large proportion of the casualties on our own roads come from something like that—where trainmen are hurt, for example.

I should say also that the English statistics of accidents are not divided into causes exactly as are ours. Of all the employees killed in Great Britain in 1890, 30 per cent is put down as owing to "coupling, shunting, and caught between vehicles," while in our American statistics 15 per cent is ascribed to "coupling." The reason of the larger percentage due to these causes in Great Britain is not that more persons were killed in proportion to number employed, but that the other causes for accidents were very much less fatal in Great Britain. For example, 22 per cent of the fatalities to employees in the United States were owing to accidents to trains, while but 5 per cent is chargeable to that cause in Great Britain. That explains the difference in percentages of fatal accidents, because of coupling and switching, between the two countries.

While the American statistics do not include "walking, crossing, or standing on track while on duty" as among the causes, these are chargeable in Great Britain with nearly one-third of all the employees killed. It is possible that the accidents in the United States from these latter causes, which, as everyone knows, are really responsible for many deaths and injuries here as well as in Great Britain, may be put under some one of the other heads in the statistician's tables, presumably under the head of "coupling," which in many parts of the country and on many roads is a term used to cover more or less of switching and other yard work in general. My respectful suggestion to the committee therefore is that if these statistics are to be made the basis of a car-coupling bill it would be well to find out how many of these accidents were owing exclusively to the form of the coupler.

Mr. MOSELEY. I want to say that the result of the statistician's report was the result of the railroads who have reported the number of men who have been killed and injured in coupling cars.

Mr. GREENE. That does not cover my point, for I am not criticising the good faith of the commission or its statistician.

Mr. MOSELEY. It is to conform to the railroads themselves.

Mr. GREENE. That is true. I have talked with a great many railroad men on the subject. The point is that the statistics up to the present time do not show the number of casualties caused by the form of the coupler. For example, suppose the car is thrown with some violence against another car and a brakeman should happen to be injured thereby, the form of the coupler would have nothing to do with that injury. Of course I do not wish to say that people are not injured in coupling, only that the number is probably less than would be inferred by the tables given.

Now, the total number of employees killed in the United States last year from coupling cars is given as 369, while the number that was

injured and killed in trains is more than that. The proportion is from 15 to 22.

If it were possible to avoid some of our train accidents—in other words, if we could direct public opinion, for example, to the question of blocking or interlocking signals and appliances of that kind—we would really do the employees more service and save more lives than by legislating about couplers. From what the people who report to the Interstate Commerce Commission say to me, I doubt very much whether the form of the coupler, since the statistician makes that remark that no statistics have been gathered, is really responsible for the stated number of lives lost or persons injured from "coupling."

As far as we know, the dangers from all services to train men are about 50 per cent greater in the United States than in Great Britain. This arises partly from the fact that fewer men, proportionately to volume of traffic, are employed on our railroads, and partly because the hurry of business is greater here.

I understand that the type is not patentable, but that practically we can not have the type without using some form of invention which is included in the other. Is that true, Mr. Ely?

Mr. ELY. Well, generally. I do not think that has much to do with it.

The CHAIRMAN. Are you gentlemen who are buying these devices now to equip your trains paying anything for the patent?

Mr. ELY. They are bought just like a chair, or any other manufactured article. I suppose if there is any royalty it is included in the price paid for the article.

The CHAIRMAN. What do you pay for one of these couplers?

Mr. ELY. The open price is $25 per car. I think it amounts to 4½ or 5 cents a pound for the material. The cost of application is very little.

Mr. GREENE. I merely make the remark that more people are killed from falling from cars than by the couplers. That can be prevented if the company uses air brakes. But that is mixed up with the other question, because it is more difficult to fit an air brake to the cars when automatic couplers are not used. The air brake will reduce the expenses of a railroad. More people are killed through the lack of the air brake by falling from the cars, according to the statistician's own figures, than are killed by the couplers. That is why the board of trade is trying in England to form public opinion in regard to this matter. There are other subjects than couplers more important to railroad employees from their own standpoint.

Mr. RODGERS. I would like to have just one word in response to what Mr. Ely has said, which was suggested by his remarks. There appears practically before you, gentlemen, four propositions: One to enact a bill specifying what the form of coupler shall be; second, to enact a bill, such as I have suggested here, providing that an automatic coupler shall be adopted, and trust that the Master Car Builders' type has received such impetus that it shall carry itself. The third is to enact a bill creating a commission to go all over this subject, which has been gone over for years; and the fourth is to do nothing at all.

Mr. Ely is in favor of the fourth plan—to do nothing. He then squints at the idea of having a commission to go over these things and

invite the inventors to come before them with their 7,000 patents, and dig over the ground and thrash over the wheat that has been dug and thrashed over for the last ten years.

So far as legislation is concerned, I think the time has arrived for legislation to compel these indifferent roads to adopt some automatic coupler.

Second. With regard to the idea of appointing a commission, I have no faith in it at all. I think it will make confusion worse confounded, and throw into chaos what now is nearly getting into line.

With regard to the second proposition, to enact into law a specific type of coupler, I would like to ask Mr. Ely whether, if there is any law passed, he would prefer enacting into law some type, and if so, the Master Car Builders' type?

Mr. ELY. I certainly would.

Mr. RODGERS. You certainly would?

Mr. ELY. Yes, sir.

Mr. RODGERS. Now, my own impression is that that is not a very expedient thing to do; but if by the committee it shall be regarded as an expedient thing, I will say that I drew up some time ago a bill which would bring that about.

The difficulty with Mr. Ely is that no bill meets his approval. I am afraid he is waiting for the millennium to come before these brakes and couplers shall come. When the millennium comes I fancy all of us here will not care what kind of brake and coupler is used.

If it is considered by this committee, after having meditated upon the subject, desirable to legislate into existence the Master Car Builders' type, I will leave here a draft of a bill and call attention to the fact that at the proceedings of the Master Car Builders' Association held at Cape May, I think it was in June, 1891, they defined what the contour lines should be. That definition was subsequently modified by a circular from James W. Cloud, the secretary of a committee which was appointed by the Master Car Builders' Association at that time, and here is the circular setting forth what contour lines these couplers should conform to in order to meet with the requirements. So if it be regarded as expedient to enact that into law, I would suggest that the first section of the bill which I have presented be amended so as to read:

That no common carrier subject to the provisions of the act entitled "An act to regulate commerce," approved February 4, 1887, shall haul or permit to be hauled upon any railroad, after January 1, 1893, any car (other than passenger car) engaged in interstate commerce, as defined in section 1 of said act, unless said car shall be equipped with automatic couplers of the kind known as the "Master Car Builders' type;" that is to say, said couplers shall be of such size and dimensions and shall conform to such contour lines as are set forth on plates 6 and 7 of the printed official report of the proceedings of the twenty-fifth annual convention of the Master Car Builders' Association, held at Cape May, N. J., June 9, 10, and 11, 1891, as modified by a circular from the executive committee of said Master Car Builders' Association, dated Chicago, September 1, 1891, signed by John W. Cloud, secretary.

If there is any other way to define it and not stereotype it out of redemption, I do not know what it is.

I have also provided, if this alternative should be expedient, that the Interstate Commerce Commission shall have power to modify these contour lines if it shall be deemed expedient by them to do it.

In view of this suggestion of Mr. Ely, I will take the liberty of

leaving with you a copy of the proceedings of the Master Car Builders' Association, and a copy of the circular that I have just alluded to, and the proposed bill.

Mr. ELY. It was not my suggestion. Mr. Rodgers asked, if any bill was to be passed, whether I approved of specifying the type of coupler, and I said, yes; if any should be passed it should specify A or B, or whatever it is, of the Master Car Builders' type. I did not suggest it.

Mr. RODGERS. Whatever that may be I have this to say, that if the difficulties of enacting anything are so perfectly overwhelming; or, putting it in another way, if the objections to enacting a bill such as I have suggested are such as to leave it to the railroad companies, it really compels the adoption of the Master Car Builders' type by reason of the survival of the fittest.

Senator JONES. In view of what was suggested by Mr. Ely a while ago as to the introduction of these couplers, and of the fact, as I believe he stated, that for the last five years the number in any one year has been doubled in the next year; that now there are 140,000 cars which are equipped with these couplers, and the manufacturers of these couplers are selling 30,000 a month—I take it that the railroads do not buy these for fun—it would seem that they are being rapidly introduced, and if these figures should obtain, the entire railroad system of the United States will be equipped with these couplers by 1897, the time contemplated in your bill.

Mr. RODGERS. I will answer that question. One reason for the prompt equipment is that in many of the States of the Union there are laws already on the statute books requiring that the railroads within that State shall equip their cars with automatic couplers by a certain date.

Senator HARRIS. What States?

Mr. RODGERS. New York, Massachusetts, Connecticut, Iowa, and Nebraska, and there are other States. But the great State of New York, where pretty much every car in the United States finally brings up, and the fact that it can not get in there without having an automatic coupler under the statute existing at the present, has had a great deal to do with spurring these features on. I believe that the company represented by Mr. Ely, the Pennsylvania, and certain others will do what they can, and, while this legislation would not affect them much one way or the other, I may say that I know that there are many other railroad companies that will not do anything until they are compelled to do it, and the only way to bring about uniformity is Federal legislation.

Another feature of the bill suggested by Mr. Greene, that the statistics given in the reports that he has read do not show whether the people were injured from automatic coupler or some other kind of coupler, I may say in the State of New York, in the returns which were made to what was my board, we had the provision inserted as to whether the injury was done by means of an automatic coupler or some other kind, and I know of no case resulting from two automatic couplers coming together. There are a great many dangers resulting from the use of the old link-and-pin coupler.

Mr. ELY. I want to say that in considering the progress made in the introduction of couplers it should be remembered that there are a

great many cars in existence so constructed that it will be impracticable to use the automatic couplers without many changes in the cars themselves, which is necessarily a slow process.

Senator JONES. What did you state was the price, the cost of automatic couplers on freight cars?

Mr. ELY. About $25 on the car.

Senator JONES. For the pair?

Mr. ELY. Yes, sir.

Senator JONES. That would be about $12.50 on each end?

Mr. ELY. Yes; we call it per car. It costs very little for labor to put it on if cars are built for it.

Senator JONES. Is it a fact that the standard coupler does not cost any more upon all cars?

Mr. ELY. Yes, sir.

Senator JONES. So that the roads are now spending about $375,000 a month for couplers?

Mr. ELY. That is correct, as given to me.

Senator HARRIS. About what is the life of a freight car?

Mr. ELY. Fourteen or fifteen years.

Senator HARRIS. What would be the period of this automatic coupler? Would they last longer or not?

Mr. ELY. They would last much longer. It is like the knife, first the blade and then the handle. The parts are renewed as worn, and the coupler must always be kept in order.

STATEMENT OF HON. WILLIAM J. SEWELL.

Mr. SEWELL. Mr. Chairman, when Mr. Ely made his statement I was absent, attending another committee. I wish to know if Mr. Ely has gone over the ground to the extent of giving all the figures?

In the first place, there are about 1,000,000 cars in the country. There are about from 150,000 to 200,000 of the new automatic couplers adopted and already on the cars.

Mr. ELY. I think it is nearer 200,000. I suppose there are 200,000 in use to-day.

Mr. SEWELL. That is 20 per cent of the whole number. That has been done without any legislation. The Pennsylvania Railroad, I believe, has from 110,000 to 120,000 cars.

Mr. ELY. We have about 25 or 30 per cent.

Mr. SEWELL. They are building now about 5,000 cars, all of which will be equipped with the automatic couplers and air brakes. Every car that goes into their shop has put upon it the automatic coupler, so that 20 per cent up to this time, without any legislation, have been supplied with this automatic coupler. I was anxious to hear Mr. Ely state what additional progress has been made, as compared with three years ago. That is to say, if it were 20 per cent three years ago, it has gone up to 30 or 40 or 50 per cent.

The CHAIRMAN. He has given us those figures.

Mr. SEWELL. The Master Car Builders' Association is composed of representatives from these railroads, and the adoption of these new automatic couplers is due to the combined intelligence of these builders. The Master Car Builders, I understand, do not vote on any question of this kind until after consultation with the leading officers of the railroads.

Mr. Ely represents 3,000 engines in this country, which is the largest car-manufacturing establishment in the country, all of which are now being equipped in this way. The difficulty with legislation is that you will retard the progress of these changes. In the meantime, if you arbitrarily say that a commission composed of John Smith and John Jones shall recommend to Congress, it will take two or three years to get their recommendation. By 1896, if the progress goes on without let or hindrance on the part of legislation, you will have automatic couplers on all these cars.

Now, there is the danger. While we do not propose to obstruct or interfere with anything of the kind, we merely wish to show what we are doing, and where we will arrive by this legislation.

At 3.30 o'clock p. m. the committee adjourned until Wednesday, February 17, 1892, at 10 o'clock a. m.

WASHINGTON, D. C., *February 17, 1892.*

The committee met at 10 a. m., pursuant to adjournment.

Present: Senators Cullom (chairman), Wilson, Hiscock, Chandler, Higgins, Harris, and Jones.

STATEMENT OF JOHN H. KING.

Mr. KING. Mr. Chairman and gentlemen of the committee: I have very little to say. You have already been told that our committee, which is composed of five members, has been unable to come to a conclusion as to what is best to be done.

Senator HARRIS. What is your committee?

Mr. KING. The committee appointed by the national railway commissioners' convention, which is composed of the Interstate Commerce Commissioners and the railroad commissioners of the different States of the United States. This committee was appointed at that convention. Mr. Crocker is chairman, and Mr. Rodgers, Mr. Hill of Virginia, Mr. Smith of Iowa, and myself are members.

Mr. CROCKER. Will you allow me to make a statement?

Mr. KING. Certainly.

STATEMENT OF GEORGE G. CROCKER.

Mr. CROCKER. Mr. Chairman, the committee to which Mr. King refers is a committee appointed at a national convention of railroad commissioners a year ago, composed of five members, appointed for the purpose of drafting and submitting to Congress a bill with reference to securing the speedy adoption of driving-wheel brakes on locomotives, of train brakes on freight cars, and of uniform automatic couplers on freight cars. When that committee was appointed all the members of it were members of State railroad commissions. At the present time only two members of the committee are in office as members of State railroad commissions. A majority of the committee, therefore, are not railroad commissioners, and the three members who happen to be here this morning are the three members who are not now railroad commissioners.

The CHAIRMAN. Are you not still a member of the Massachusetts commission?

Mr. CROCKER. No, sir; I resigned on the 1st of January.

Senator HARRIS. You are all ex-commissioners, however?

Mr. CROCKER. Yes, sir, ex-commissioners. There was a question in our minds as to whether under the circumstances we ought to serve on the committee, but there was no way of filling the vacancy on the committee, if we were to resign, until after the next annual convention of railroad commissioners, to be held some time in April next, and, after consultation with the members of the Interstate Commerce Commission, we came to the conclusion that it was our duty voluntarily to do what we could in furthering the objects for which we were appointed.

Shortly after the appointment of the committee, a circular was addressed to the railroad companies of the country asking for information upon the various subjects which were referred to the committee. The responses to that circular were received and digested through the kind services of Mr. Moseley, the Secretary of Interstate Commerce Commission, who also served as clerk of our committee. In November of last year a meeting was held in the city of New York, of which public notice was given and at which railroad companies and railroad employees were represented. The committee heard all the evidence that was brought before it, and then went into consideration as to the form of bill to be submitted. When we parted in New York we were unable to agree upon the form of bill.

Now, I will state that the committee, organized in the way it has been—a member from Iowa, a member from South Dakota, a member from Virginia, a member from New York, and a member from Massachusetts—is one which it is difficult to bring together in consultation. It seemed that it would be too much to ask the committee to meet again in Washington for consultation, and subsequently again for the hearing before this committee, and so arrangements were made with Mr. Moseley to get ample notice of the time when this committee was to get a hearing, and to arrange for a meeting of our committee immediately prior thereto for consultation. That has been done, and we had three members of the committee together yesterday. I regret to say that we have been unable to come to an agreement in regard to the form of bill to be submitted.

Do not, however, conclude that our failure to do so indicates any insuperable difficulty in the way of preparing such a bill. We have never been able to be brought together, owing to our diversified residences. We shall submit to you certain bills which have commended themselves to one or more members of the committee.

Mr. Smith, of Iowa, has prepared a bill, for which he has gotten the approval in writing of one or two other members of the committee, which bill will be submitted to you for your consideration, with the letters indorsing it. Mr. Rodgers, of the committee, appeared before your committee last week. He happened to be in Washington at the time and presented his bill. Mr. King has a suggestion of a form of bill, and I also have a bill which I desire to submit for the consideration of the committee.

The question of what should be done as to hastening the adoption of the safety appliances upon freight cars has been under discussion for a good number of years by the conventions of railroad commissioners held in Washington, and also in State legislatures. The convention of railroad commissioners several years ago took the matter in hand

and passed resolutions in regard to it, and resolutions have been adopted by various States in relation to it.

The three things which seem to be the most important are the application of driving-wheel brakes to locomotives. That is a question which concerns the safety of railroad travel, and is important because it is the application of brakes to a very large percentage of the weight of a train, the driving wheels being the means which are used to propel the train, and therefore being a very powerful instrumentality in stopping the train.

The next matter in increasing importance is the matter of the application of train brakes to freight cars. Our freight-car service is not only inadequately "braked" at the present time, brakes being on only half the wheels, but there are yet brakes which have to be operated by employees who travel over the tops of the cars and who are exposed to great danger from falling from the cars and also from overhead obstructions. Not only that, but the brakes can not be applied with the rapidity and the certainty which is necessary for reasonable safety in railroad traffic when our tracks are occupied, as they are at the present time, with a great number of trains and with little intervening time.

The power train brake, such as is used on the passenger train, can be applied to the freight cars, and when it is applied to the freight cars you will not dispense with the necessity of brakemen going over the tops of the train at that time. You will not dispense with the necessity of having brakemen on the trains or the necessity of their going over the tops of the trains at times, but you will largely dispense with the necessity of doing it under emergencies in the excitement of rushing from one car to another in ordinary cases. Therefore, both for the safety of passenger traffic and for the safety of employees on railroads, the speedy adoption of train brakes on freight cars is a necessity.

Now, there is another and still more important feature which the committee of which I am chairman desires to bring to your attention in behalf of the convention of railroad commissioners, and that is the matter of couplers upon freight cars. There have been attempts for a good many years to devise automatic couplers for freight cars, and it is said that there are some 5,000 patents of automatic couplers. There is practically no limit to the variety of automatic couplers which can be devised. There is a great number of these automatic couplers which will work automatically and safely with other couplers of the same description and of their same character. But when a coupler of one kind which is automatic is brought in contact with an automatic coupler of a different kind the automatic clutch entirely fails, and instead of having added safety there is added danger, because the two things do not go together properly. For instance, one form of coupler which is largely adopted on the roads in the United States (I mean the automatic coupler which is largely adopted on roads in the United States) is a vertical plane coupler, which is a coupler similar in form to the position of my hand [exhibiting to the committee] and works on knuckles like that [exhibiting to the committee]. When two couplers of that sort come together they clasp in that way [exhibiting to the committee]; but you take a coupler of that sort and bring against it a link-and-pin coupler and

you will see the two couplers are calculated not to couple automatically. They will not do it. They are calculated more to smash each other. They are calculated to increase the danger rather than to diminish it.

With reference, therefore, to the question of couplers, there is a peculiar element involved in the problem, and that is that it is not sufficient for each road to adopt a form which is in itself good. It is necessary that each road and that all roads should adopt a uniform kind of coupler, or, in other words, couplers which will be interchangeable, which will work automatically with each other.

Now, throughout the United States there is a great diversity in couplers. They are of all sorts and kinds, and the brakeman never knows when he goes to a car what kind of a problem he has before him; and what we desire to bring to your attention is the importance of this problem and the reasons which we believe to exist why, with reference to these three matters, there should be Congressional legislation; why, with reference to these three matters, it is reasonable to break away from the general rule of noninterference with railroad companies in such matters.

In breaking away from these general principles we should break away from them just as little as possible. We should go only just so far as is absolutely necessary to accomplish the results which necessity compels.

Now let me give you some idea why this is an exceptional matter.

In the United States for the year ending June 30, 1890, 369 employees were killed and 7,842 were injured in coupling or uncoupling cars. That is a total of 8,211 men killed and injured during one year in coupling or uncoupling cars, and in ten years that means a total of 80,000. That total means more than that, because last year the total was a thousand more than it was the year before.

The CHAIRMAN. How do you account for that, if you will allow me to ask you the fact? Is it because there are more miles of railroad, or more difficulties because of this mixture of couplers?

Mr. CROCKER. More miles of railroad, more business being transacted, greater press in yard, and, in part, perhaps due to the mixture of couplers. On that point, however, we get no definite statistics, and that is merely a surmise.

In fact, there are certain indications in my own State of Massachusetts which lead to the impression that it may be that the danger of coupling a link-and-pin to a Master Car Builders' type of coupler, for instance, is so apparent and so great that the employee is on his guard and takes unusual precautions. It sometimes so happens in railroad matters that the most dangerous things are not the things that lead to most accidents, because the danger is so terribly obvious.

Now, I say there were 8,211 killed and injured during the year ending June 30, 1890. The total number of employees killed and injured in all the various occupations in which they are engaged for that same year was 22,000. So that the number of employees killed and injured in coupling and uncoupling cars was over one-third of all the accidents which happened to employees in any way, shape, or form in their various forms of employment. It is more than two and a half times as many as the injuries happening to employees in consequence of collision, derailment, and all other train accidents. This one thing of couplers causes more than two and a half times as many accidents

to railroad employees as collisions, derailment, and all other train accidents included.

So much for the coupler question by itself.

Now let me say one thing further in regard to that. All those 8,000 accidents, that vast number of accidents, can be practically eliminated from the list if we can get uniformity and automatic action in couplers. The number of accidents of that sort will be diminished to very trifling proportions.

Now we go to one thing further, and that is the accidents that are directly or indirectly connected with the lack of train brakes on freight cars. For the same year the number of persons killed by falling from trains was 561; injured, 2,363. The total number of killed and injured was 2,924.

From overhead obstructions—killed, 89; injured, 345. Total number killed and injured from overhead obstructions, 484. So that the total accidents from those two causes are 650 killed and 2,708 injured, or a total of killed and injured of 3,358.

Now, that class of accidents will be largely diminished. It will not be so largely diminished as the other, but it will be largely diminished if freight cars are equipped with train-brake apparatus. That class of accidents, 3,358, added to the 8,211 which result from coupling and uncoupling cars, make 11,569 accidents resulting from those two causes, which is more than one-half of all the accidents which happened to employees in the United States during the past year.

Those proportions in my own State of Massachusetts are even larger than that, for the reason that Massachusetts is a terminal State and the dangers in freight yards are greater than they are in States where there is a through business. I think, therefore, I have given to the committee reasons why we believe that this is a matter which justifies somewhat exceptional treatment on the part of Congress.

On the other hand, it must not be understood that in placing these figures before you I am disposed to criticise the management of railroads upon this matter. The advance which the railroads of our country have made in speed, in comfort, and in safety has been little short of miraculous. But there is an apparent necessity of bringing about uniformity through some legislation upon this subject.

Senator HARRIS. How would you determine as to what particular coupler is to be the uniform coupler of the railroad system?

Mr. CROCKER. I was just coming to that. If you will pardon me, I will state that I was just going to strike that point. Now, I am very much opposed to any form of legislation enforcing the adoption of any specific coupler by name. I am very much opposed to Congress attempting to select a coupler, or leaving it for any commission to select a coupler, and it seems to me that such methods should not be resorted to, unless as the last extreme and only method by which the object can be accomplished. And the effort which I have made in drawing a bill upon this question has been to draft a measure which would leave it to the railroad companies of the country to determine what the form of coupler should be, and then giving to that form of coupler the authority of the United States as the standard for interstate traffic throughout the United States, and compelling the railroad companies within a reasonable time to equip their cars with the standard coupler so prescribed.

The CHAIRMAN. How long a time? Have you specified that in your bill?

Mr. CROCKER. Yes, sir. The first section of the bill relates to the power driving wheel brake.

On and after the first day of January, eighteen hundred and ninety-three, no common carrier subject to the provisions of the act entitled "An act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, shall put in use on its line in interstate passenger or freight traffic any new locomotive unless such locomotive is equipped with power driving wheel brakes.

SEC. 2. On and after the first day of January, eighteen hundred and ninety-five, no such common carrier shall use in hauling interstate passenger or freight traffic any locomotive which is not equipped with power driving wheel brakes so arranged as to be operated in connection with the train-brake system: *Provided, however*, that the requirement that the power driving wheel brakes shall be so arranged as to be operated in connection with the train-brake system shall not apply to locomotives used only in yards for switching purposes.

That is, it requires them on new locomotives to put a power brake on every one of them after the 1st of January, 1893, and to have all the locomotives equipped by the 1st of January, 1895.

The next sections, 3, 4, and 5, relate to train brakes.

SEC. 3. On and after the first day of January, eighteen hundred and ninety-three, no such common carrier shall put into use or haul or permit to be hauled on its line for the transportation of interstate freight traffic any new car belonging or leased to it, or any old car belonging or leased to it, which subsequently to the passage of this act has been sent to its shops for general repairs unless such car is equipped with brakes for each wheel and with train-brake apparatus of such a nature that the brakes can be set and released from the locomotive.

SEC. 4. On and after the first day of January, eighteen hundred and ninety-seven, any such common carrier owning or having in its control cars equipped with brakes and with train-brake apparatus as set forth in the preceding section sufficient in number to duly transport the interstate freight traffic coming to it from connecting lines may lawfully refuse to haul or to permit to be hauled over its line cars received from such connecting lines unless such cars are duly equipped with brakes for each wheel and with train-brake apparatus arranged to be operated from the locomotive and of such a character that it can be operated in connection with the train-brake system in use on its own cars.

SEC. 5. On and after the first day of January, nineteen hundred, no such common carrier shall haul or permit to be hauled on its line for the transportation of interstate freight traffic any car which is not equipped with brakes for each wheel and with a train-brake apparatus of such a nature that the brakes can be set and released from the locomotive.

We give, therefore, seven years and a half before the final accomplishment of that result shall be required.

The CHAIRMAN. As to brakes?

Mr. CROCKER. As to brakes; and in regard to that I may say that the application of train brakes to a freight car costs about $50 a car. It means an expenditure on the million cars used in interstate traffic of $50,000,000.

The CHAIRMAN. What proportion of the cars have them now?

Mr. CROCKER. Something over 100,000 are now so equipped.

The CHAIRMAN. What proportion are equipped with automatic couplers?

Mr. CROCKER. With reference to the car couplers there are about 110,000, apparently, according to the latest statistics, equipped—that is, according to the statistics of June 30 last. There were about 110,000 equipped with the Master Car Builders' type. There were about 60,000 equipped with other forms of automatic couplers,

so called, making 170,000, and the balance, 788,000, I think, were presumably equipped with the link and pin.

The CHAIRMAN. It was stated before the committee, I think, at the meeting a week ago, that there were from 140,000 to 200,000 equipped with car couplers, and that the party manufacturing these couplers was turning out about 30,000 a month, and it looked a good deal to the committee if that was going on at that rate they would get the couplers all on before any bill would be passed to that effect.

Mr. CROCKER. We know nothing, except the latest absolute information which we have is the information which was received in response to the circular of our committee which was sent to all the railroads of the country on the 30th of June last year, and there is no question but that there is a considerable progress in the matter of putting on the Master Car Builders' type of coupler—very rapid progress. On the other hand, some roads are changing from the Master Car Builders' type to other types, and some roads are putting on other types of vertical couplers or types of automatic link-and-pin couplers on new cars. They are putting them on at the present time, and the object of any bill which may be submitted is to bring about a determination of the question as to what shall be the standard couplers of the United States, so that this diversity shall not go on, and so that these roads shall not be going on in different directions and following different methods, according to the section of the country in which they may be located.

The CHAIRMAN. Please call the attention of the committee to the provisions of your bill which will regulate that feature.

Mr. CROCKER. That is in section 6—

On or before the first day of July, anno Domini eighteen hundred and ninety-three—

Now, in regard to this provision, I wish to say to the committee that I have endeavored to be very conservative; that I have endeavored to interfere as little as possible with the operation of railroads, while at the same time accomplishing what I believe to be necessary results.

On or before the first day of July, anno Domini eighteen hundred and ninety-three—

That is, a year from next July—

every such common carrier shall file with the Interstate Commerce Commission in Washington a statement certified to under oath by the president and clerk of the corporation as the action of said corporation through its board of directors, setting forth such details in form, size, and mechanism as it deems essential in every freight-car coupler in order to insure requisite conformity, requisite automatic action, and requisite safety in service, and also stating the number of freight cars owned by it and under its control, and also the number of other cars under its control by lease on the thirtieth of June, eighteen hundred and ninety-two, exclusive of those used solely for State traffic. Such statements shall be made upon blanks to be provided by the Interstate Commerce Commission, and the determination of such commission in relation to the validity of the several statements received shall be final. If upon examining the statements so received said Interstate Commerce Commission is of opinion that companies owning at least sixty per cent of the freight cars owned and controlled as aforesaid by companies which shall have duly filed statements as aforesaid have agreed upon such details of freight-car couplers in form, size, and mechanism as will insure requisite conformity, requisite automatic action, and requisite safety in service, said Commission shall thereupon declare and publish that couplers complying with such details so agreed upon shall thereafter, until

otherwise ordered, according to law, be the standard couplers for use in the freight-car interstate service.

SEC. 7. After the expiration of six months from the publication of such declaration by the Interstate Commerce Commission no common carrier subject to the provisions of the aforesaid act to regulate commerce shall put into use for the transportation of interstate freight traffic any new car belonging or leased to it or any old car belonging or leased to it which subsequently to said date has been sent to its shops for general repairs unless such car is equipped with standard couplers prescribed as aforesaid.

SEC. 8. On and after the first day of January, eighteen hundred and ninety-seven, any such common carrier owning or having in its control freight cars equipped with standard couplers prescribed as aforesaid sufficient in number to duly transport the interstate freight traffic coming to it from connecting lines may lawfully refuse to haul or to permit to be hauled over its line freight cars received from such connecting lines unless such cars are duly equipped with such standard couplers.

SEC. 9. On and after the first day of January, nineteen hundred, no such common carrier shall haul or permit to be hauled on its line for the transportation of interstate freight traffic any car which is not equipped with standard couplers prescribed as aforesaid.

SEC. 10. An employee of any such common carrier who may be injured by any locomotive or car in use contrary to the provisions of this act shall not be deemed guilty of contributory negligence in consequence of continuing in the employ of such carrier after the unlawful use of such locomotive or car has been brought to his knowledge.

The CHAIRMAN. Suppose that that sixth section is not complied with by the agreement of 60 per cent of those representing cars, how do you bring them together after that?

Mr. CROCKER. The sixth section, as you will see, is drawn in this way, that if 60 per cent of those should make statements. It will not be safe for the railroad companies not to make general response to that circular. I think it is a simple and very effective way of bringing about the result.

Senator CHANDLER. If 60 per cent do not, then your sixth section does not take effect?

Mr. CROCKER. If it should be that 60 per cent would not agree, then the object to be accomplished would not be reached.

Senator CHANDLER. Sections 6, 7, 8, and 9 depend upon the agreement of 60 per cent of the companies.

Mr. CROCKER. Yes, sir. The fact is that the companies will agree, they will be compelled to agree under that, because they will not be willing to leave the possibility of the standard coupler to be determined against their interests. One side or the other is going to come down to two forms——

Senator CHANDLER. Suppose the railroads really do not want any legislation upon this subject (and we see no evidence that they do), it is perfectly possible for the railroads to paralyze these sections by adopting a different style of coupler. The Pennsylvania system would adopt one style, the New York Central would adopt another, and the Baltimore and Ohio another, etc. Then the law is nugatory.

Mr. CROCKER. Yes; if they should do that.

Senator CHANDLER. We simply legislate ourselves into their hands, and all this class of people you want to protect we deliver over to the railways and say, "Now, you do not want any legislation, but here is some, and whether it is especially effective or not you may decide. If you will agree, then the law is in force and it is penal. But if you will manage to differ your law is gone." Is not that the effect of it?

Mr. CROCKER. Yes, sir; that is exactly it. But will they take that

position? In the first place, it is going to be a very great advantage to them to have a standard form of coupler prescribed in this way. It will be an advantage to them in matters of expense, because their couplers will not be broken up by couplers which come in contact with them which are not fitted to couple with them. It will be an advantage to them in the matter of damages, because they will when they do get this uniformity which they all desire—I know they all desire it—when they do get this uniformity the amount of injuries will be very greatly increased, and if they do not have this uniformity they will have to pay for the injuries which ensue.

Then still further and most important is this, that the railroad companies of the country do not want Congress to interfere and prescribe the forms of couplers which they shall use, or any form of safety appliance. They do not want to drive Congress or the people to any measures which look toward nationalism. They do not want to be before the people in the position of being unable to agree among themselves, and being therefore in a position where the Nationalists shall say, "You have proved that you can not run interstate railroads satisfactorily yourselves, because you can not agree. You have had ample opportunity to come to an agreement. You have thrown that opportunity aside, and now is the time when you have forced Congress to make good for your own deficiencies and your own inability to come to some understanding."

Now, gentlemen, it is possible to draw a bill much more stringent than this. Bills have been drawn which are much more stringent than this, but the question is, Can those bills pass Congress? It is better to have this than it is to have nothing, and it seems to me that every element of self-interest will lead the railroad companies of the country to adopt this opportunity of determining for themselves what their standard shall be, and having it approved by the authority of the United States.

Now one question will occur to your minds probably which ought to be provided for in the bill, and that is this: That if they should agree upon a standard form of coupler, the persons who might be the owners of inventions involving those details agreed upon might be in a position to charge an exorbitant price for their inventions, and I think a clause should be inserted in the bill to this effect before the clause "said commission shall thereupon declare," "and if said commission is satisfied by bond or otherwise that the royalties to be charged for any invention involved in the details as agreed upon as above shall not exceed a sum per coupler which shall be reasonable."

Then it may prescribe them as the standard coupler that will force everybody into an agreement as to the amount to be paid for the coupler. And one thing further in the bill ought to be amended, and that is before the words "in form, size, and mechanism," "setting forth such details with reference to height, form, size, and mechanism as it deems essential." The matter of the height is a thing which is very important and which should be definitely stated.

I will submit to the committee later a draft of the bill with these corrections made so that they may have it in correct form.

I desire simply to say in regard to this that this is a mere suggestion coming from me and not in any way as representing the committee of which I am a member. Other members of the commit-

tee have and will submit to you drafts of bills which conform to their idea.

At the last session of the Massachusetts legislature, impressed with the great number of accidents which happened in that State and throughout the country from these causes, some resolutions were passed and a committee of three, consisting of one on the part of the Senate and two on the part of the House, was appointed to appear before Congress and present the resolutions and to urge the passage of a bill, and that committee are here present.

The CHAIRMAN. Gentlemen, I think it will be necessary for the committee now to take a recess, and the hearing will be resumed, I should say, at half past 1 o'clock.

Mr. HAINS. Mr. Chairman, may I say a word?

The CHAIRMAN. Yes, sir.

Mr. HAINS. I appear here for the railroads in this case. I am vice-president of what is known as the Plant system of railroads in Georgia, South Carolina, Florida, and Alabama. I am also here as the president of the American Railroad Association. I do not wish to take up your time just now, but as you have not probably had a chance to hear what I do not want to call the railroad side of the question, or the railroad statement of the question, I hope we may have an early opportunity to be heard after the recess, as I and my colleagues have come here at considerable inconvenience to our business.

The CHAIRMAN. The committee will hear the gentleman after it resumes its session this afternoon.

Mr. MELLEN. Mr. Chairman, I will say that there are two or three delegations from Massachusetts. Mr. Crocker represents the railroad commission. Then there is a gentleman who represents the legislature of 1891 and the resolutions that were sent to Congress on the subject-matter that you are considering. There is another committee representing the legislature of 1892. You have heard the railroad commission in the person of Mr. Crocker. The two committees from Massachusetts will be pleased to be heard this afternoon.

The CHAIRMAN. We would be glad to have you gentlemen consolidate what you have to say, and have one or two men of each committee, if possible, address the committee.

Mr. MELLEN. I desire to suggest right here that this is the outcome of an agitation that was started by some members of this committee who are here to-day, and that side of the question which represents these thousands of men who are maimed and killed would like to have a fair show to present their case.

The CHAIRMAN. They certainly shall have a fair show, so far as this committee is concerned.

Mr. HAINES. If you will permit the railroad statement of the question to be made immediately after recess, in which I will endeavor to be as brief as possible, perhaps you will find that much unnecessary argument will thereby be done away with, because we shall probably suggest a great many things that will assist you in coming to a conclusion.

At 12 o'clock m. the committee took a recess until 1 p. m. At the expiration of the recess the committee resumed its session.

STATEMENT OF H. S. HAINES.

Mr. HAINES. Mr. Chairman and gentlemen of the committee, I appear before you to-day on behalf of what is known as the American Railway Association, an organization of the railway corporations of this country, with a mileage of 122,000 miles out of perhaps one hundred and seventy-odd thousand miles that there are in this country. I am personally connected with what is known as the Plant railroad system, a system of railroads in South Carolina, Georgia, Florida, and Alabama. I am the vice-president of that system, having been at times superintendent, chief engineer, and general manager.

The association for which I speak has a definite purpose. Its purpose is the development and the solution of problems connected with railroad management, and it would therefore seem eminently proper that in a question of the character you have now under consideration, this particular association of railroad corporations should be heard with reference to what is confessedly a most important problem connected with railroad management.

This association will perhaps be more familiar to you under its former title of general time convention, under which title it succeeded in establishing in this country what is known as standard time. It has also established a uniform set of hand and lamp signals for the use of train men, and also a uniform code of train rules, and we shall hope before we get through with this question that probably we shall have contributed something to the solution of this problem also.

I am here with some of my colleagues at the request of our executive committee, which is composed of Mr. Royce, general superintendent of the Chicago, Rock Island and Pacific Railway; the general manager of the New York, New Haven and Hartford; the vice-president of the New York, Lake Erie and Western; the general superintendent of the West Shore, and the general manager of the Chesapeake and Ohio. I only mention this to show what a representative body we are.

The CHAIRMAN. Are the switchmen represented?

Mr. HAINES. No, sir; we represent the railroad companies.

The CHAIRMAN. We are anxious to hear somebody who represents the men who are engaged in this work.

Mr. HAINES. Our executive committee is composed of representatives of the following roads: Chicago, Rock Island and Pacific; New York, New Haven and Hartford; Louisville and Nashville; St. Louis, Arkansas and Texas; New York, Lake Erie and Western; Lehigh Valley; West Shore; Chesapeake and Ohio, and myself, representing the Plant system. I mention this to show that it is a representative body, a body which represents pretty well the railroad interests of this country.

I will say to you, what you will probably be pleased to hear, that we have not come here to antagonize anybody. In fact, we know from what we have been able to gather, that we are on a line, and the same line, with what has been attempted to be accomplished by the committee on safety appliances of the convention of railroad commissioners and what is the desire of the several associations of railroad employees through their representatives.

I have said that perhaps it may be pleasant for you to hear that we

are all in one line as to what we desire to accomplish. If there be any difference between us, it is a question as to which of the measures which we will submit for that purpose will best succeed in accomplishing the purpose which we all have in view.

I propose now simply to state a few matters of fact. I will state that I am and have been vice-president of this association, and some years ago we established a committee on safety appliances. The purpose of that committee, which is a standing committee, is to consider all matters of safety appliances, the successful operation of which depends upon the united action of the railroad companies. We do not undertake to consider isolated matters, but only those for which united action is necessary. Among the first we took into consideration was that of safety appliances. We have, as I say, a standing committee on that subject, composed, at the present time, of the president of the Fredericksburg and Potomac Railroad, Major Myers, who is with us here; the general superintendent of the Fitchburg; a representative of the Delaware and Hudson; Mr. Ely, general superintendent of motive power of the Pennsylvania Railroad; Mr. Merrill, the general manager of the Chicago, Burlington and Quincy; Mr. Odell, who is here, general manager of the Baltimore and Ohio; Mr. Fillmore, general superintendent of the Southern Pacific Company; Mr. Whitman, general manager of the Chicago and Northwestern, and Mr. Hammond, superintendent Boston, Revere Beach and Lynn Railroad. This is the standing committee which has this matter in hand.

We took up this question of couplers, which had already received the attention of what I may call the technical part of our railroad service; that is to say, an association of the master car builders of the railroad companies, not a voluntary association, but just as we are, an association representing the railroad companies. That association took up the matter of car couplers some years ago, and after a good deal of consideration, in which there was brought under their notice every variety of coupler that was known in this country, either practically or, I may say, theoretically, they came to the conclusion that the course which had been pursued successfully with reference to coupling passenger cars was the course which should be pursued with reference to the coupling of freight cars, and that the same principle which had been adopted in the one should be adopted in the other. But the couplers in use on passenger cars, which have become generally in use, much more generally since they took this action, what we call the vertical hook type of coupler, was a very expensive device, too expensive to be used on the large number of freight cars that there are in use in this country, and they devoted themselves to cheapening that device so that it would come within the reach of our requirements for freight-car service.

They did not undertake to establish a coupler; they undertook to establish a principle to which all couplers should conform. That was that they should be mutually interchangeable, never mind whatever might be their details, that they should couple with each other. That left it to the well-known ingenuity of the American inventor to exercise his powers in any direction he pleased, provided he conformed to that one principle. The success which attended their efforts in that direction seemed to be such that when it was brought before what I

may call the body of managers of railroads of this country it was referred to its committee on safety appliances, and that committee, after careful consideration, a year ago last October, made a report to the semiannual meeting of the American Railway Association, in which they recommended that the companies, members of this association, should thereafter conform to the vertical hook type of coupler, what was known as the Master Car Builders' contour lines, in all new constructions.

That was discussed in open meeting of the association, and it was adopted with but two dissenting votes. I will state that one of the railroad companies that voted against it has since adopted that idea and that principle.

Now, that is where we had brought it up to October, 1891; that is, that these couplers, of whatever patent they might be, should conform to a certain principle which I will not undertake to elaborate here. It is sufficient for me to say about that that any coupler that conforms to that principle must interchangeably couple with every other coupler that conforms to that principle.

You have had before you some statistics on this subject. They date back so far that we consider them not reliable to use before you. We have, therefore, through our own organization, obtained more recent information which brings it up to about the 1st of the current month. The information which you have before you, which has been noted, is up to the 30th of June, 1890. That information is to the following effect: For the year ending June 30, 1889, there were 80,000 what are called "automatic couplers." On the 30th of June, 1890, there were 115,000 automatic couplers. In this are included certain couplers that would not have come under our prescribed rule, because they were not mutually interchangeable, but they called them "automatic," because they would couple among themselves. The first statement included passenger-car couplers as well as freight-car couplers, and they show that there were at that date 88,000 cars equipped with freight-car couplers which they called "interchangeable."

I will show you now what is our record of what we call the Master Car Builders' couplers, which are mutually interchangeable. I will state that we have 171 corporations members of this association. We had only obtained at the time we made up this statement, which we had to make up rather hurriedly, reports from 91 members. These 91 members have about 700,000 cars at the present date.

These 91 members, with a mileage of about 75,000 miles of railroad, had in use on January 1, 1887, couplers of the kind I am speaking of, mutually interchangeable, on 6,300 cars. In January, 1888, they had 11,000; in January, 1889, they had 22,000; in January, 1890, they had 47,000 cars equipped with the Master Car Builders' coupler. In October, 1890, our association adopted this principle.

On January 1, 1891, we find that the cars equipped have risen from 47,000 to 84,000. On January 1, 1892, they had risen to 134,000, and the latest statistics we have, coming up to about the 1st of February, show that there are about 136,000 cars belonging to these 91 railroad companies, with a mileage of 75,000 miles and freight cars of about 700,000 in number; that is, about 20 per cent of their total freight cars were equipped at that date with what we call the "Master Car Builders'" type of coupler.

Senator HARRIS. Does that include passenger cars?

Mr. HAINES. No, sir. I understand that we are speaking now of freight cars.

Now, that is not all. We have gone a little further and we have undertaken to ascertain from our members what they are doing about their new equipment. It has so happened that the company which I represent, which has a mileage of between 1,300 and 1,400 miles of road, has never used a vertical hook type of coupler in its freight service, but since the 1st day of January we have made a contract for 1,000 cars to be fitted in that way.

What are the others doing? We find that these 91 companies have now under construction 26,000 cars with this style of coupler, and I am told by the car builders of this country, a number of whom I have seen recently in connection with this subject, that it is the rule since the action taken by the American Railway Association that the cars ordered shall be equipped with the Master Car Builders' type of coupler.

Now, these are facts, gentlemen, and they are fresh and they are authoritative. They come from the best sources that we can have, form the managements of the railroad companies themselves, reporting to their own organization.

Now, I have said what is the situation to-day with reference to the adoption of a uniform type of coupler, and I think I have brought it to a point at which we can now begin to discuss another aspect of this case, and that is as to the legislation with reference to this matter. I understand the tendency of this legislation to be of a most laudable character and one in which we are entirely in accord, and that is that this committee desires to consider the proposed bills before them with reference to the safety of the men who use these couplers. That is the aspect of the case to which I propose to refer—the possibilities of legislation. It is not a question as to whether we should have a uniform coupler or not. The question is whether we shall have that kind of a coupler which will protect men's lives and protect them from personal injury, and that is the yardstick that is to be applied to all proposed legislation.

I have read the various bills that have been before us. I have seen those which have been presented and considered by the Senate committee, and I have tested them by that yardstick, as I have called it, and that idea is not dominant in any of these attempts to prescribe the kind of a coupler. They attempt to pick out automatic couplers and interchangeable couplers and uniform couplers. In the first place, there is no such thing as an automatic coupler. We do not want one. If you mean by "automatic" a thing which will act without the intervention of human agency, we certainly do not want that kind of coupler. It is all right for the cars to couple when you want them, but you do not want them to couple when you do not want them to do so. Of course, it is all right if they should uncouple when you want them to. What we all want and what the representatives of these employees want, what the committee on safety appliances of the State railroad commissioners' convention want, and what this committee wants is a coupler which can be used without danger to the life or to the limb of the man who manipulates it.

The CHAIRMAN. What is that?

Mr. HAINES. That is exactly the test that I think all of us want to apply, and we have got a little confused on "automatic," "interchangeable," "uniform" couplers. I claim, gentlemen, that so long as we provide a coupler which can be manipulated without injury to the person manipulating it, that is all you ask, and that is the only kind of legislation which from the moral standpoint you can fairly ask, because if you are going to go further, if you are going to undertake to prescribe mechanical devices, if you, as I say, attempt to prescribe uniformity, it is death to progress. If you are going to petrify the art of railroad invention at the spot it is now, what will be the result? What would have been the result if a few years ago you had stopped the progress of invention on air brakes when we had the first Westinghouse brake? When the Westinghouse brake was first applied the president of our company came to me and said: "That is what we have been wanting. Let us put it on." I said: "No. It is in its experimental stage. Let us wait. If you will wait a little while you will see something come out of that which will be very much better, and you will be sorry that you have ever adopted this."

What was the result? Westinghouse's first brake was limited in its application. He had not experimented with it long before he found that he could so improve it that it was bound to act under any and all circumstances, even if the train parted, and those who had taken his first brake had to throw them away and reequip their passenger trains.

That is what you will do if you take and petrify the condition of the art of railroad couplers at the point that it is now. You will prevent that well-known mechanical ingenuity of this country from improving on what we have now. I ask you in their behalf as well as in our own that you shall not do that, which would simply apply that system to the couplers you have.

Gentlemen, there are, as you have heard, 5,000 different patents for couplers, and when you think of that you say to yourselves, "How, out of this vast number of couplers, shall we attempt to pick one?" If you made the effort you would have not only those 5,000 inventors dead against the thing, but you would have the 10,000 more who think they can invent something better.

We have not done that. We have prescribed the principle for uniform couplers; that they shall be mutually interchangeable and uniform only as to a certain principle. That excludes all other couplers, I am told, but about four or five hundred patents. What difference does that make? I will show you two couplers which are as different as they can be, so far as their patent's relations are concerned, and yet they will couple together without the slightest trouble. [Exhibiting couplers to committee.]

I am going to show you where the difference is. They will couple [exhibiting and explaining coupler to committee]. You see they are of entirely different patterns, and yet they will couple here because they conform to that principle that I have told you about; that is, they have certain ideas which are essential to their being mutually interchangeable. Every one of the five hundred will do the same thing. Where do they differ? They differ with reference to the locking device. That is all. I will show you another one and show you what it is that it is necessary for the man who is coupling to

know, what he wants to be able to do, to stand outside of one car and manipulate that locking and unlocking device. This is but a small sample of the device. If this were the same size it would lock with ease. What the man who manipulates the coupler wants is that every coupler, never mind what it is, shall have what we call the release rod, that controls the locking device, so arranged that he can stand outside of that car and operate it.

The CHAIRMAN. And the unlocking device.

Mr. HAINES. That is all the same. So long as that is the case, so long as he knows that he can go to the same place, and that a place of safety, and find that rod always there at the same place and he performs the same manipulation, what does he care whether the unlocking devices and the locking devices are the same? What does he care? It does not concern him. If he can stand right outside the car and put his hands right there [indicating] and find that rod and turn it and unlock that coupler, that is all he cares about.

Now, I hope that I have contributed something toward a solution of this problem, which seems such a terrible one. It is just this, that so far as you are concerned in the interest of humanity, so far as we are all concerned, so far as the gentlemen who represent these associations of railroad employees are concerned, what they ask of us in this connection is that they shall be able to conduct their ordinary work in safety to themselves. If they are able to do that they do not care what device we use; it is none of their affair; they do not care, if we will just give them a safe device, so that they will know, whether it is dark or raining, when they go and stand in that place, and that a place of safety, that they shall find a rod that they can put their hands on and uncouple that car.

The CHAIRMAN. Do I understand you to say that you are in favor of legislation on the subject?

Mr. HAINES. I am coming to that, whether it is necessary or not. Following that rule all the time, what can you gentlemen do to assist all of us in promoting this thing that we all have at heart, the speedy adoption of couplers that will be safe to manipulate?

Now I have told you what the railroad companies have done. The drawing which I have here is not large enough for you to see it at this distance. If you gentlemen will just notice that, you will see with what an accelerated ratio this work is going on. [Exhibiting map to committee.] I tell you that to-day over 20 per cent of the cars of this country are equipped with a coupler that is mutually interchangeable, that has a release rod, where a man can stand on the outside of the car and handle it without danger to himself.

Now your minds will naturally revert to the statistics that have been placed before you with refernce to the injuries, some of them mortal, that these men have received in coupling.

The CHAIRMAN. In making the change from the present condition to the kind of couplers you would adopt, what would be the result on the people engaged in the business?

Mr. HAINES. I am coming to that. You will notice all these devices. There is a slot made in the knuckle here [exhibiting]; that is made to couple the cars if they are fitted with a link and pin, and I assert that it requires more caution, greater dexterity, to couple a

ling-and-pin coupler to a coupler of this pattern than to another link-and-pin coupler.

We are in a transition period. We are passing from a coupler which is confessedly a dangerous one to a coupler which we assert to be entirely safe with the appliance of a release rod standing outside to control the locking device. In passing from one to the other during this period I am of the opinion, and I share this belief with those who are engaged practically and come in daily connection with this matter, that there is an increased danger until the time 50 per cent of the cars are equipped with what we will call the Master Car Builders' type of coupler. When you reach that point you will find more cars coming together with this coupler than with a link and pin and this coupler. From that time on the number of dangerous couplings will decrease until finally the old link-and-pin coupler will have disappeared from use altogether.

That has been accomplished in other things in this country. Those who have been familiar as I have been for twenty odd years with the progress of railroads—I have been in the business ever since I was 16 years old—have seen many great changes brought about by the larger lines, the trunk lines, in our country using uniformly the same devices, and the other lines have fallen into line. They had it to do. They have done it, many of them reluctantly, but the pressure brought to bear on them by the principal lines was so great that they could not carry on their business without conforming to the more advanced requirements on these other roads. That is just what is taking place with this coupler question. The great roads of the country are not only having their new cars equipped, but they are making it a rule that every car that comes into the shop for general repairs shall be equipped at both ends with one of these several patents, all of the same type, and all interchangeable. That work is going on on the Pennsylvania, on the Central, on the Erie, on the principal western systems; it is going on so generally that the time is going to come when the railroad companies themselves will insist that they will not accept a car that is not provided with one of this type of couplers. They have not gotten to that point yet. They have, as I have told you, only 20 per cent so far. There are about 1,100,000 cars in this country, and we think on the basis of those roads which have reported to us that there are perhaps 220,000 out of that 1,100,000 that are equipped with these devices.

It is a still more important point for you to bear in mind that the new cars are almost without an exception being equipped in this way. You may find 500 cars here or 500 there that are not, but I tell you that there are 26,000 cars that are reported to us as being under construction to-day which are being equipped with these devices. I am only showing you how the railroads are solving this problem for themselves and how they will solve it at an accelerated ratio.

Suppose we admit that the people representing the railroad companies appreciate the responsibility of their positions, what is due to their employees as well as the railroad companies, and that they are going along with this work on the right line, what can we do to help along?

The idea seems to be that we can be helped in this matter—I am

speaking of the American Railway Association, which is on record as wanting its members to do this thing, by a vote in which there were only two negatives—what can you do to help us in this matter? I will tell you what fixing a date at which something shall be done, and nobody knows what it is, would do.

The CHAIRMAN. Suppose we were to fix a date that this device or idea that you have elaborated here shall be adopted by the railroads of the country, and that thereafter no cars shall be used in interstate traffic unless they are so equipped?

Mr. HAINES. You have not done that so far.

The CHAIRMAN. That is what we are talking about.

Mr. HAINES. I want to show you now what has been the effect. There is a feeling abroad among railroad managements that Congress feels impelled to do something, and that something will be to pick out from among the 12,000 couplers some one, and say thus far shalt thou go and no farther. I do not say that is a correct impression, but that is the idea that has got out.

Now, what has been the effect on the part of those railroad companies who are rather reluctant to fall into line? I had a gentleman call on me the other day representing a very largely used coupler of this type who had been in the State of Ohio attending to his business in introducing his wares there. I asked him how he made out. He said he felt discouraged; that so far as the lines were concerned, the through lines that ran across the State of Ohio, they were of course putting on the couplers; but the local railroads in the State came to a dead halt, and they are afraid to do anything They are afraid that whatever they do—if I present my device to them they say, how do I know after I get my cars fitted up in that way that Congress will not say we shall use some other coupler?

Now, when you bear in mind that there are $25,000,000 involved in this question, you can see how important it is to a man who is responsible to the stockholders for the expenditure of their money, and the great trouble has been that they do not know what you are going to do. They are afraid you will do something different from what they are doing now, and it is an excuse in a great many instances for doing nothing.

That paper which I presented will show that very thing. It shows from the 1st day of January that lines which were progressing upward at a pretty good rate seemed to have halted for a while. It seems to have had that effect. I do not assert that. That conclusion might be drawn from it, but what I told you as to what occurred in the State of Ohio was information given to me from a reputable man.

Now you ask me, "What can you do to help us in this?" It seems to me, if I have stated my case clearly, that we are solving this question so rapidly that before any date that you could fix, even though you accepted this very device here, if you said as the gentleman did this morning (I think Mr. Crocker allowed about seven and a half years), if I thought we were all going to wait seven and a half years before we solved this problem, I should feel more discouraged than I now do.

The CHAIRMAN. Is it your judgment that all the railroad cars of the country will be furnished with automatic couplers, or couplers of some sort to be used interchangeably?

Mr. HAINES. It is always dangerous for a man speaking in a representative capacity to state an opinion. I have endeavored so far to confine myself to facts and what might be logically deduced from those facts.

Let me state now what we have done in the matter of couplers in passenger-train car service. We first had what we call the Miller coupler. We now have what is known as the Janney coupler, which type has proved to be much superior, so much so that it grew and kept growing, until to-day the principal lines of this country that are using the Miller coupler are preparing to throw it off of their trains and adopt such a coupler as will couple with the rest that we have. You may say to-day it is substantially the fact that the entire passenger equipment of this country is equipped with that device.

Senator WILSON. Why would the fixing of a type tend to obstruct your progress toward the adoption of such couplers in the intermediate time?

Mr. HAINES. The first thing would be that it would be a very serious matter, I suppose, rather a difficult matter, for you to attempt to prescribe this type of coupler without its meeting with a good deal of opposition from those who do not want that type.

Senator WILSON. Suppose we did not prescribe any particular type, but left that question to your action, only holding you responsible for the adoption of something which would insure safety?

Mr. HAINES. That would be entirely agreeable to those of us who are on that line already. But what would be the effect on those who have not advanced quite as far as we have?

Senator WILSON. Would it not in that case have the effect of hastening their action?

Mr. HAINES. Suppose you suggest, as the gentleman proposed this morning, five or seven years. I am afraid such is human nature that those who are reluctant to be pulled up to the place where we are would set back and say, "We have five years yet in which to settle this matter. We are not going to settle it this year." But I tell you, gentlemen, that as soon as the principal lines in this country get their own cars sufficiently equipped with this device, which they will—they are doing it now—it will have a ruling effect upon the other roads, and the difficulty of having link-and-pin couplers mixed up with them will be so great that they will insist that they will not accept a car which will not couple with this without any intervention of a man having to go inside between the cars to perform that operation.

Senator WILSON. Unless there should be some rule of public policy adopted, how could some of those companies refuse to take a car not thus provided which was in the interstate commerce service?

Mr. HAINES. Well, I do not like to quote a trite saying, but it occurs to me about Columbus and the egg. The fact is that it is done to-day. I do not know whether it is done lawfully, but yet it is a fact.

Senator WILSON. I am speaking of it from a legal standpoint.

Mr. HAINES. I am giving you a practical reply. I am not a lawyer. To-day the railroad companies say, "We will and we won't take this car, and we will and we won't take that car. We prescribe certain rules, and if the car does not come up to that requirement we will not take it."

The CHAIRMAN. Is that because of a question of safety in coupling the cars?

Mr. HAINES. Yes, sir; and if a car comes to them that they think is not safe they will not take it.

The CHAIRMAN. If it is not safe they are not required to.

Mr. HAINES. Suppose it should be said, You shall not determine this question of safety or not safety? I will tell you that the railroads on the Pacific slope will not take a car from any of us to-day that does not have an air brake on it.

The CHAIRMAN. All that is settled now.

Mr. HAINES. I do not know of any railroad company that has made it a legal issue. I have not said much about the question of air brakes because the burning question is the coupler.

The CHAIRMAN. They both burn a little.

Mr. HAINES. Yes, sir; I am prepared to say the same thing about the air brake. We have not got as far along with air brakes as we have with the coupler question. There are mechanical difficulties to be overcome yet in the use of air brakes on long freight trains that have not been solved. I will state that I think this matter has passed the experimental stage, so far as the type or principle involved is concerned; so that when you take up the question of air brakes you have yet to solve a mechanical difficulty, and that is the use of air, which is the principle which we all seem to have agreed upon among ourselves—the use of air in the application of power brakes upon a long train of freight cars. That question is, as I say, in the experimental stage, and yet I am prepared to show what progress has been made on that subject also. I myself must confess that I expressed a little surprise when I saw how much had been done. This very paper which I have here shows on this line what has been done in that direction.

The CHAIRMAN. That all seems well to a man who looks at that paper, but you can not tell what is on the paper by reading your testimony. I wish you would state it so that it will appear in your testimony.

Mr. HAINES. Very well. The present condition of freight cars in service fitted with air brakes is such that there were about 103,000 cars so equipped on the 1st day of January, 1892. Of course that means freight cars. There are about 18,000, out of the 26,000 which are under contract to be fitted with air brakes, I mean, which are to be fitted with this type of coupler. Of that 26,000, 18,000 will be equipped with air brakes. Now, it seems to me that that work is progressing as rapidly as could be expected, until we shall have solved the problem of using successfully compressed air on long freight trains. There have been recently some very careful and extended experiments made by the Chicago, Burlington and Quincy Railroad with reference to the use of different kinds of air brakes. There has come up the question of interchangeability. Then the question was whether they could use different patents of air brakes mixed up together satisfactorily. This is to be solved yet.

As to the third point which has been made, as to the use of power brakes on engines, I will state that nobody thinks of building an engine without putting power brakes on it. We would not have one without power brakes. We are putting them on all engines, even the

switching engines which are provided for in this bill. That question is taking care of itself.

There is evidence in here that there are now some 17,000 engines with power brakes applied to the driving wheels.

The CHAIRMAN. Is there anything further you wish to say?

Mr. HAINES. There is one other thing I would like to call attention to, because it is corroborative of what I have stated here. It is the matter of curing the evils in railroad management of this character by legislation.

I quote from the Engineering Journal of December, 1891, page 535. Here is an article on the very question of car couplers, and they quote such parts referring to that legislation as summed up by Mr. Thomas Farrer, permanent secretary to the British Board of Trade, in giving his evidence before a royal commission appointed to inquire into the causes of accidents on railroads.

He says:

> But after all these admissions, general interference with the administration of railways is objectionable on the following grounds:
>
> By such interference you are setting two people to do the work of one. Double management is notoriously inefficient. One bad general is better than two good ones.
>
> You set those who have less experience of management and less personal interest in the result to control those who have more.
>
> Control is either apt to become formal and a sham, or if zealously and honestly exercised, to be rigid, embarrassing, and a hindrance to improvement.
>
> Many excellent things, the adoption of which is desirable for public safety, e. g., the block system, interlocking points and signals, efficient brakes, properly constructed ties, are not things which can be once for all settled, defined, and prescribed, but things of gradual growth, invention, and improvement. Had any of these been prescribed by law at any past time they would probably not have been what they are now, and were they now prescribed and defined by law future improvement would be checked. This is a most insidious form of evil, for we do not know the good which we thus prevent. It is no answer to say that Government control would be intelligent and would encourage improvement. It is not Government or its officers who invent and adopt inventions, and those who do so are far less likely to improve when Parliament or Government has defined and prescribed a definite course, the adoption of which frees them from responsibility.

The CHAIRMAN. Have you anything further to say?

Mr. HAINES. No, sir. I believe I have concluded, unless my colleagues would like me to make any other suggestion. Mr. Meyers is the chairman of our committee on this particular subject.

Mr. MELLEN. I would like to inquire if it is the rule of this committee to hear the opponents of a measure before the friends of it have an opportunity to present their side?

The CHAIRMAN. The gentleman who has been talking indicated this morning that his remarks would probably remove the necessity of statements on the other side.

Mr. MELLEN. If I understand the tenor of his remarks, he is opposed to doing anything; hence he is opposed to our proposition.

Mr. HAINES. I believe I am through unless you would like to ask me some other question.

The CHAIRMAN. I know of nothing further now.

STATEMENT OF WILBUR H. POWERS.

Mr. POWERS. Mr. Chairman, I fully appreciate the needs of the hour. You have but little time and I do not desire to take much of it, and I shall endeavor to keep that promise fully as well as those who have preceded me.

It seems to me that there is an evil; that it is admitted; that there is no question upon that point upon which anything need be said.

The question is the remedy. I am not here to go into any particular system or to discuss the question, as I understand it, of car couplers from the standpoint of the mechanic or anything of that kind. But I am here to represent the sentiment of Massachusetts upon the subject of legislation.

The remedy has been attempted in our own State. From time to time there came before the railroad committee representatives of the employees of railroads and the railroad commissioners, and those who are interested in this general subject, who ask us for legislation. Our reply to that is, or has been heretofore, usually that it is of little use for the State of Massachusetts to pass legislation relating to this subject, because, while we might legislate another State might not, and therefore very little good would be done.

Now it would seem to us that something ought to be done, and that that something ought to be done by Congress. Therefore last year a resolution was passed. It was recommended by the committee on railroads. I have the resolution here and will submit it without reading.

The resolution is as follows:

[Commonwealth of Massachusetts, In the year one thousand eight hundred and ninety-one.]

Resolution relating to couplers and brakes on freight cars.

Whereas from the last published statistics of the railways in the United States, being for the year ending on the thirtieth day of June, in the year eighteen hundred and eighty-nine, it appears that three hundred employees were killed and six thousand seven hundred and fifty-seven injured in that year in coupling and uncoupling cars, being fifty-six per cent of all the accidents happening to train men, and practically all these accidents can be avoided by the adoption of uniform automatic couplers for freight cars; and

Whereas five hundred and fifty-eight employees were killed and two thousand three hundred and seven injured by overhead obstructions or by falling from trains and engines, being twenty-three per cent of all the accidents happening to train men, and a large proportion of these accidents would be avoided by the adoption of the train brake on freight trains; and

Whereas the regulation of couplers and of train brakes upon freight cars is of pressing importance and is within the proper scope of the powers of the Congress of the United States, while action by the individual States on these subjects has produced and must continue to produce conflicting and unsatisfactory results; and

Whereas at the convention of railroad commissioners lately held in Washington at the rooms of the Interstate Commerce Commission, upon motion emanating from the board of railroad commissioners of this State, a resolution was unanimously adopted providing for the appointment of a committee of five to appear before Congress as soon as possible after the opening of its next regular session, and urge the passage of measures calculated to insure and hasten the adoption of uniform automatic couplers and train brakes upon freight cars, and of driving-wheel brakes on engines,

Resolved, That the senate and house of representatives of the Commonwealth of Massachusetts, in general court assembled, approving of the action of its board of railroad commissioners, do most respectfully and earnestly urge upon Congress the consideration of the foregoing subjects, to the end that the consummation which all desire may be reached with the utmost reasonable speed, and

especially do we urge upon our Representatives in Congress to join energetically in promoting wise, speedy, and effective action, and that a committee of one on the part of the senate and two on the part of the house be appointed to convey this resolution to Congress, and act in conjunction with the committee appointed at the convention of railroad commissioners to urge upon Congress a speedy consideration thereof.

HOUSE OF REPRESENTATIVES, *March 30, 1891.*

Adopted: Sent up for concurrence.

EDWARD A. MCLAUGHLIN, *Clerk.*

SENATE, *April 6, 1891.*

Concurred.

HENRY D. COOLIDGE, *Clerk.*

A true copy.
Attest:

EDWARD A. MCLAUGHLIN,
Clerk of the House of Representatives.

Those resolutions state for themselves the feeling of the legislature last year in relation to this important subject.

We ask for legislation. We do not ask that a particular coupler be adopted. For that we do not care, and have no preference; but we do ask that something be done to hasten the time when there shall be a uniform system.

The gentleman who preceded me says while there is an evil it is being remedied, and therefore little legislation at the present time is needed. We feel that something should be done to hasten the transition stage. It is well known to all that when any reform is commenced there are a good many who say, "You can not do anything to aid this reform; it will come of itself. Sentiment must back up your law to a certain extent."

That is true. In the Commonwealth of Massachusetts the sentiment is right. What we ask for is legislation. The gentleman who preceded me admits that the sentiment is all right. But there are always a few who hang back. There will be a few railroads that will say, "Oh, if this committee reports that no legislation is necessary upon this subject, then we shall still cling to the link and pin."

We do not want that. We think a date should be set when they should, at least, do away with the link and pin. We think a day should be set when the safety coupler which they have here described, or some other coupler which is safe, should be adopted, and upon that we think legislation would be a great aid, and we are to urge upon you that you take a step in this direction which shall not only tend to hasten the time, but shall tend to show that Congress is willing to aid in this reform.

The railroads, of course, when public sentiment pushes them, must necessarily take some step; but not all railroads. There will be short railroads that do not care particularly for public sentiment, and there will be some large railroads that will be not very particular about the sentiment of the public as relates to them. The railroads as a whole will concede that public sentiment is something upon which they must act; and if you say a day shall be set, and you set it, when this appliance shall be in general use, or cars are not to be drawn over these roads, or something of that kind, it seems to me that you will hasten the time of this transition stage, and that in this way you will do something that the railroads say ought to be done. You will be aiding a reform, and you will at the same time not be doing an injury to the railroads.

That is all I desire to say to you.

The CHAIRMAN. You take the ground that some legislation is necessary. Now, can you define, as nearly as you may be able, what sort of legislation should be adopted by Congress?

Mr. POWERS. The particular thing which it would seem to me ought to be done is to set the date when the coupler should be of a safe character. There are certain couplers that are now known to be unsafe. Why should they still be permited to be used?

The CHAIRMAN. You have heard the discussion by Mr. Crocker on the bill offered by him and presented to the committee to-day. Have you any criticism to make of that bill?

Mr. POWERS. I should not care to criticise the bill for the reason that I have not examined it with that care with which one ought to examine any bill in order to criticise it. Neither would I care in all respects to say that I knew it was just right for the same reason.

The CHAIRMAN. I did not know but what you had given it careful consideration.

Mr. POWERS. I only saw the bill when it was presented to the committee this morning, and certainly some principles of the bill are correct.

The CHAIRMAN. There is a provision in that bill that seems in a measure to leave the matter open as to any compulsion. Do you think that would be a safe provision to enact in the light of what he says?

Mr. POWERS. You now ask for my personal opinion?

The CHAIRMAN. Yes.

Mr. POWERS. It seems to me if you should pass a law of that kind 60 per cent of the railroads would fall in with it.

The CHAIRMAN. You believe they would?

Mr. POWERS. I think so.

The CHAIRMAN. Suppose they did not; then what would happen?

Mr. POWERS. You would still be in your present condition, and I should not object to having that section so framed, or the bill so framed, that it would compel them, whether they decided to fall in with it or not. I should not necessarily urge that that section of this bill be held as of any wonderful importance, but my own personal view is that they would fall into it.

The CHAIRMAN. You think it would come out all right because 60 per cent of them would be in favor of it?

Mr. POWERS. The railroads in Massachusetts are following that particular idea.

The CHAIRMAN. And the air brake?

Mr. POWERS. And the air brake. I have not heard so much said in relation to that, even in Massachusetts, and I think the railroads there are anxious, both in relation to couplers and brakes, to get the best, and that they will readily fall in and assist in any legislation which would tend to make the couplers safe or the brakes safe. I think that they would very readily be a part of the 60 per cent.

STATEMENT OF F. H. RAYMOND.

Mr. RAYMOND. Mr. Chairman and gentlemen of the committee: I do not wish to take the time of the committee any further, because Mr. Powers has so well represented his committee here in regard to this matter.

My attention was called very forcibly to what the gentleman representing the railroad stated—that many of the cross roads would not adopt a coupler because they were so uncertain of what Congress would do in this matter.

It seems to me, therefore, very important that Congress should do something. If it should do something, those roads then would evidently fall into a definite proposition, and certainly the number of deaths and accidents that are happening in this country ought to be something that would induce Congress, if possible, to frame a bill to carry out its results.

Now, regarding these couplers I know nothing. It seems to me there are several which will interlock and become practically interchangeable.

I would suggest—I do not know that it is feasible at all—that Congress should secure possession of such couplers and give them freely to the railroads who wish to adopt them. I think certainly if the expenditure of sufficient money to own couplers of this kind was necessary to prevent the loss of five or six or eight or ten thousand lives a year it would be worth the effort to secure it.

The CHAIRMAN. Do you think there is any necessity for Congress to purchase these patents in order to secure this protection by legislation?

Mr. RAYMOND. If many of the railroads are so poor that they can not buy this I think they ought to be helped out, when you consider the fact that it is to prevent the loss of life. There is a member of my committee here, who represents the other side, who is desirous of being heard.

The CHAIRMAN. Which do you call the other side?

Mr. RAYMOND. From the operatives' side, representing their interests more particularly. I would like to have Mr. James H. Mellen address the committtee.

STATEMENT OF JAMES H. MELLEN.

Mr. MELLEN. At 4 o'clock yesterday afternoon we took the train for Washington, and most of us only had an intimation the night before that we were going to be assigned to this duty. Hence, the first time we have had an opportunity to look for the authorities with an idea of presenting a case was in this room this afternoon.

I have here the reports of the railroad commissioners of Massachusetts, a very conservative body. The ex-chairman, Mr. Crocker, you heard this morning. But I am not without some knowledge of the subject.

I have been a member of the Massachusetts legislature for ten years. I began fifteen years ago. I have been most particularly identified, as is pretty well known in Massachusetts, with the legislation seeking the amelioration of the condition of the employee class, and I believe I have introduced or supported almost every measure that has gone on the statute books of Massachusetts in the direction of legislative reform in the interests of the masses during the past fifteen years.

Let me say here that the United States, I am plain to say, a community of States governed by the people, in the interests of the people, so said, is less considerate of the interests of the common people,

the employee classes, than is the sometimes somewhat effete constitutional monarchy of Great Britain and Ireland—that is, if the matter is to be determined by the number of ameliorative acts upon the statute books of the respective Governments. That is not to our credit; but I am pleased to say that of all the States in the Union that approach England in legislation in the interest of the great masses the State that I have the honor to claim as my native State leads the van, and that they are not cranky in the enactment of legislation. As an evidence of it we can point to the fact that the other States of the Union are one by one copying Massachusetts enactments in the line of the protection of the operative class.

Ten years ago I introduced a proposition looking to the protection of the railroad people. My colleague from my city, a fellow-Democrat—I may interject here that the most of my committee are Republicans, so that we are not divided on political lines on this question—has been the champion of legislation in the direction that that legislation would indicate within the past ten years.

The CHAIRMAN. This is the resolution that you referred to?

Mr. MELLEN. We should have submitted one to-day, Mr. Chairman, that was enacted yesterday, but we had not time to wait; we had to take the train immediately.

I am sure you will take our assurance that the Massachusetts legislature of 1892 has reiterated what it said in 1886, what it said in 1888, what it said in 1889, what it said in 1890, and what it said in 1891, and now, we say, in 1892, and we tell the representatives of vested rights, in the name of humanity we ask how many more years will we have to reiterate those resolutions before the Congress of the United States takes some definite steps?

Leave it to these gentlemen? How evasive are the gentlemen's replies to you? They are artfully dodging the issue. They have very astutely presented the case of railroads who are not disposed to take immediate action.

Now, we are not radical. In Massachusetts we have been just so conservative that we have convinced the most conservative of our railroad people that we are right. The gentleman you heard this morning, representing in his family a million dollars of stocks, and a gentleman who is not supposed and who is not known to be affiliated or in sympathy with the so-called labor reform people of Massachusetts, is thoroughly imbued with the need of this legislation. He is a splendid railroad lawyer, and has got as much interest perhaps as any one individual in this room who represents any of the railroads that are here represented.

Hence we say we are not cranky. We are not asking for anything impracticable. We do not even want to draft our own bill. We permit the conservative railroad interests who are disposed to do something to draft the bill. We do not want the thing to go into effect twelve months of twenty-four months or thirty-six months hence if it is not impracticable. But if the thing can be done and if two thousand lives and twenty thousand maimed, brave fellows can be saved by reason of the enactment of some bill by this Congress this session within the next year, then we want it done.

We are here to represent humanity. We are not here to oppose vested interests or do aught to their detriment. We are not inimical to them. We say, as is said by our conservative railroad men, that the

same is practicable, and we want these people who are dragging behind the procession of progress to come up abreast of us.

I was somewhat amused at the sneering remark, if the gentlemen will permit me to say, at the leveling process, at the retarding of civilization that any such enactment would effect. We do not want to retard progress. We do not want to interfere with American invention. We want to stimulate it.

The CHAIRMAN. You have studied the subject a good while. What kind of an act would you favor if you were a member of Congress?

Mr. MELLEN. I would vote for an act that would oblige the railroads subject to the authority of the Interstate Commerce Commission to adopt some interchangeable coupler within at least twenty-four months.

The CHAIRMAN. You have heard Mr. Crocker expound the provisions of his bill. Do you give your assent to these provisions?

Mr. MELLEN. I do not in the main, although I think I appreciate the force of a suggestion made by a Senator that it put power in the railroad corporations to block the purpose of the act. I would frame it a little differently. I would not put that power in their hands.

The CHAIRMAN. Do you think that probably 60 per cent of the cars represented favor something of the kind?

Mr. MELLEN. I do not know. In the East I think they would.

Senator WILSON. Do you think it would be practicable within twenty-four months for all of the companies to place upon all of the cars the coupler that you favor?

Mr. MELLEN. I think it would, and the air brake too. Now they have the air brake on all first-class cars in the country, as I understand it, and they could force all the others who have not that brake to put it on.

The CHAIRMAN. Have you made such investigations as would satisfy you that that could be done?

Mr. MELLEN. All I have is the testimony of railroad men and the opinions enunciated in our State reports from experts who were instructed by our legislature to make inquiries.

The CHAIRMAN. Do you think that in two years from the passage of the act the provision of the law ought to be that no car should be hauled unless it had such couplers?

Mr. MELLEN. I would not higgle about that. Three or four years would suit me. I think if you once give notice to the railroad corporations that it must be done within a limited time they will do it at once—set their mechanics and their inventors at work and agree upon the most practicable coupler and air brake that could be devised, and would introduce it by concurrent or joint action on the part of the railroads.

Then there is another thing in connection with that that we of Massachusetts were asked to bring to your attention, and that was the matter of forcing the railroads to heat their cars in some other way than from the heat radiated from coal in the stove. The gentleman did not allude to that in his remarks. There are a goodly number of cars that still use the old-fashioned stoves in heating. We would have the National Government interfere and put a stop to that. The holocaust at New York a few months ago should be an object lesson that should stir up the members of the National Government and cause

them to enact a law that would make it obligatory upon all railroads within a very short time to use some heating apparatus other than coal stoves.

Now, sir, the President of the United States, two years ago this December, recommended, as may be seen of course from your own documents and from a document which I have here, the doing practically of that which we are asking.

The CHAIRMAN. We are familiar with his recommendations. The difficulty with the committee has been to satisfy itself that it was not making a mistake, in any legislation it might enact, which would do the employees more harm than good. We have been groping along trying to find out as fully as possible what would be the safe thing to do.

Mr. MELLEN. We have been very active in the premises; we have secured practically a unanimity of sentiment among the people of the State; some of the most conservative have been brought around to our views. At the inception of this movement we had to meet with a good deal of opposition in the legislature in the interest of the railroads. They are now agreed. Those who have had schoolmates and neighbors killed under their eyes, who have seen their blood trickling along the road, are a little bit anxious that the National Government shall manifest more interest in the future than it has in the past.

I think it was six years ago that we sent our first resolutions. Then we sent them again four years ago, in 1888, and in 1890, and last year, and again this year; and yet, sir, so far as I know—if I am wrong stop me—the first step in the direction of positive action yet remains to be taken by our Government. Hence it is that some of us have a little bit of feeling in the matter. One State is practically unanimous, and we are told by some of the gentlemen who represent the employees that there are other States, five or six of them, in accord with this sentiment, and those States have in the main the great bulk of railroad employees of this class within their borders. I hope, Mr. Chairman, that this body will see their way clear to urge some positive action.

The CHAIRMAN. This committee has undertaken to find out, if possible, exactly what the switchmen and the laboring men employed on the railroads thought and desired on this question, and hence many of them are here to-day.

Mr. MELLEN. I want to say just this in that connection: I have been the State officer of one of the great laboring organizations of Massachusetts, as well as being in the legislature for ten years. I am somewhat familiar with this class of employees. They are probably the understrata of the railroad employees; that is, they are the poorest probably; the most thriftless; they are the least saving; their occupation is the most precarious, the most dangerous; and perhaps that may be one of the reasons why they are so reckless and so thriftless. The other classes of railroad employees are more thrifty and more careful, and as a consequence they are more potent in making their opinions felt in the body politic. Now, the occupation of the railroad brakemen, a goodly number of them are citizens, is such that they are constantly shifting about and they are of no account in politics, and I think by reason of that fact that they have been

slaughtered by the thousands, and have been maimed and crippled, pauperized, and those belonging to them as a sequence.

I am not talking about something I am not familiar with, because I was reared among just that class of people. I have in my mind's eye now a dozen men who were youths with me, who have lost their lives in my own city, or adjacent thereto, in this terribly dangerous occupation, and I know when they passed away there was a regret in the immediate circle of acquaintances, but beyond that there was the mere notice that Joe Johnson or Mike Finnegan tumbled last night from the top of the car or was thrown from the train or was bumped by a freight car and lost his life or his limb.

The CHAIRMAN. You desire legislation, and that speedily, that will give protection to these men engaged in this dangerous employment?

Mr. MELLEN. Yes, sir; and a number of States are in consonance with that sentiment. A number of us have been agitating it for ten years. They have acted and the Congress has done nothing, and we expect that it will begin doing something for that class of operatives very soon.

STATEMENT OF F. W. BLISS.

The CHAIRMAN. What is your name?

Mr. BLISS. F. W. Bliss.

The CHAIRMAN. Where do you reside?

Mr. BLISS. Boston. It is not my purpose to take part in this discussion, as I am expected to-morrow to appear before the House committee on this matter, but Brother Mellen has suggested a limiting of the time when this law which may be contemplated by your committee shall take effect. I think he has placed the limit too far ahead. The suggestion has come from Mr. Hains this afternoon that the railroad would wait until the last moment until they would do anything on this matter. It is admitted on all hands that there have been discoveries made which are an improvement over the old system of link-and-pin coupler, a system which is being used and improved constantly, and, as has been said before you, is constantly put on new cars. Now, I think that, so far as adjusting any method of coupling to a freight car is concerned, it does not require but two years to put it on. Railroad men have already considered what is the best coupling, that they are improvements over the old ones; but instead of trying to find the most perfect coupling, they should take the best ones they have within their means to-day and immediately apply them to their freight cars. Of course, gentlemen will know that railroads are prone to use up their old railroad stock, and that perhaps railroad men would hardly feel like putting modern appliances on a good many of these old cars. I think, if a period of time is to be fixed, that six months would be ample time for the railroads of the country to put on the modern couplers.

Senator HIGGINS. And to determine what new improvement should be adopted.

Mr. BLISS. I do not suppose it would be possible to discover the perfect coupler within six months or two years or ten years. I expect progress is going to be made constantly in this matter.

Senator HIGGINS. Is it your proposition that the railroads within the six months shall determine the improvement and also apply it?

Mr. BLISS. Yes, sir.

Senator WILSON. Do you think it a physical possibility that every car in use in the United States within six months could be brought within the line you suggest?

Mr. BLISS. I do not think it would be possible for cars that are owned at a remote place and that are now in use to get back to their own shops to have these appliances put on. Take a car belonging in Washington. It would hardly be time to have the car sent there and have it done in their own shops; but I think this matter could be arranged so that these improvements could be made within six months, without their being made in the car shops, but perhaps where the couplers are manufactured. I can see that it would be impossible for all the freight cars scattered throughout the United States to be returned to their homes and equipped within that period.

Senator HIGGINS. Are you a mechanic?

Mr. BLISS. No, sir.

Senator HIGGINS. You do not speak as a mechanical expert?

Mr. BLISS. No, sir.

Senator HISCOCK. What is your business?

Mr. BLISS. I am a lawyer.

The CHAIRMAN. You are a member of the legislature?

Mr. BLISS. Yes, sir.

The CHAIRMAN. You do not expect that any great amount of time will be consumed by the railroads in coming to a conclusion as to what coupler will be used?

Mr. BLISS. No; I think their minds are pretty well settled on that already.

Just one word while I am on that point with reference to brakes. The railroads already have had sufficient notice that the brakes they are using, not only on freight but on passenger cars, are not adequate. They have had a terrible accident in Quincy, where it was shown from the investigation that the six-wheel trucks have not the proper appliances.

Senator HIGGINS. In the way of air brakes?

Mr. BLISS. Yes, sir. They only apply to four wheels, and so long as the railroads can use their present appliances and rolling stock to the best advantage, perhaps, to the road, they will not adopt these improvements as rapidly as the public demand.

STATEMENT OF J. A. LAKIN.

Mr. LAKIN. Mr. Chairman, I can not agree with the gentleman who represents the railroads in regard to fixing no time for the adoption of these appliances. It seems to me that the committee should be competent to fix a time that would be reasonable.

The CHAIRMAN. What do you think a reasonable time would be?

Mr. LAKIN. I should say it would take three years, at least.

The CHAIRMAN. These general declarations are easily made, but when you come down to business we do not know what to do about it.

Mr. LAKIN. I should say it would take three years at least, from the fact that there are many cars in use that would have to be thrown away if you undertook to make it within a less time. There are a

great many cars that do not get home, I assume, in a great many months, and it may be that those cars are used back and forth. While it is intended that a car should be shipped homeward as fast as possible, I presume that there are a great many cars that will not get home in two or three years. They will be used on other roads, and it would be quite a tax on the railroads to ask them to change the old cars and put on the new appliances.

Again, there may be, inside of three years, other inventions or improvements on the system now in use.

The CHAIRMAN. You would have the railroads wait three years before they decided whether there was anything better or not?

Mr. LAKIN. No, sir. I should say that the cars should be equipped within that time; or, if in the judgment of the committee, that time was too long or too short, viewing all sides of the question, they should fix the time. I fancy that if there were no time fixed, the railroads would take fifty years, if necessary, like the man who was going to buy a cook stove and stop using the old-fashioned crane when all the improvements had been made on the stove.

Now in regard to couplers, it seems to me that the committee should decide upon some principle and not confine the system to any one patent, but if a hundred patents can be made to interchange and carry out the same principle that would be satisfactory to the employees as well as to the State which I have the honor to represent.

The CHAIRMAN. All that the employees want is the ability to couple a car without the necessity of going in between the cars.

Mr. LAKIN. Yes, sir; that is as I understand it, and the couplers that have been shown here are, I think, a step in the right direction, that the system shall not be tied up to one particular kind of coupler.

Senator HIGGINS. Will it not have to be tied up to the kind you ultimately adopt?

Mr. LAKIN. No, sir.

Senator HIGGINS. Would it not require a very radical change?

Mr. LAKIN. I should say not. The previous gentleman was asked whether he was a mechanic. He said he was a lawyer. I am a mechanic. I think I can invent in three months fifty different couplers that will have the same principle in them and that will couple together and still be different patents.

The CHAIRMAN. Would they not be the same coupler pretty nearly?

Mr. LAKIN. No, sir; they would not. They would all be different, and you would say, to look at them in different towns or in different rooms, that they would not work together, but when they came together they would work just as nicely as if they were made just exactly alike.

The CHAIRMAN. You mean that there would be some little trigger different about them, but the one principle would be governed by one patent.

Mr. LAKIN. No, sir; it would not be. It would have to be covered by fifty patents for the fifty inventions. I say there should be a system adopted by the committee so that any invention that would work in harmony with any other patent and shackle and unshackle with any other patent could be adopted by any road. I do not care to take up more of the time of the committee; I just wanted to bring out that particular point.

STATEMENT OF S. E. WILKINSON.

The CHAIRMAN. What is your name?

Mr. WILKINSON. S. E. Wilkinson.

The CHAIRMAN. What is your position?

Mr. WILKINSON. I am the grand master of the Brotherhood of Railroad Trainmen, composed of conductors, brakemen, switchmen, yardmasters, baggagemen, and passenger brakemen, and there are a few other people identified with the organization who have gone out of the railroad business.

The CHAIRMAN. Let us know what you think ought to be done in the premises.

Mr. WILKINSON. The question is a great deal easier asked than answered.

The CHAIRMAN. I have found that out myself.

Mr. LAKIN. We are very modest in our request. We want something done to better our condition; that is, to save our lives and our limbs. The organization that I have the honor to represent commenced by looking after the sick, taking care of the wounded, and burying the dead. It afterwards started out with a predetermination to become a labor organization, benefiting the condition of the men financially. How successful it has been in that one particular we leave the records to prove.

There has been a great deal of talk about automatic couplers. Those who are practical railroad men, and who are engaged in the switching and coupling and uncoupling of cars to-day, claim that they have not found any device that reaches that standard of perfection which is desired at the present time. It is claimed that these various couplers are interchangeable. The men that we represent claim that they are not interchangeable. Under certain conditions, if they be favorable, they will couple, but as a general proposition, taking the different devices, they do not successfully couple or they do not successfully uncouple unless everything is in place so that it is advantageous to th drawbar in question.

The CHAIRMAN. In the operation of the coupling of cars with these devices, does it ever occur that the switchmen have to go between the cars?

Mr. WILKINSON. Yes, sir, quite often; and it is a matter of presumption with a practical man that, so far as the devices at present in use, they will always have to do that. There is no device, unless it is the Miller—that is on the passenger coach—which does not require it, and sometimes they have to go under the platform to uncouple them. I have been identified with the railroad service for twenty years, for the larger part of that as a switchman. I have come in contact with a great many of the different devices, but during the last few years I have been identified in the labor world, and I know very little myself. I get my information from those I represent as to the practicability of the couplers that are used at the present time.

There is a great deal of difference of opinion among the men identified with this service as to what we want. Mr. Haines gave you a statement of what has already been done, and I would like to ask Mr. Haines or you the question if you understand by his remarks that he is in a position to-day, or the gentlemen he represents, to guarantee within a reasonable length of time that the same amount of progress

that has been made in the past few years will be made in the future. He did not say anything about that.

The CHAIRMAN. Mr. Haines is here, and he can answer the question himself.

Mr. HAINES. I will say that the past is a pretty good guide to the future, and looking at what has been done and accomplished since October, 1890, with us I should say that the process of adopting an interchangeable coupler that can be coupled from the outside of the car without going in between is proceeding at an accelerated ratio. There are about 20 per cent of the cars so equipped to-day. I do not say that under no possible contingencies would it be necessary to go in between the cars, but I say that under no possible contingency is a man compelled to go in between the cars when it would be dangerous for him to do so, with the adoption of a release rod connecting the locking device of the Master Car Builders' type of coupler.

Mr. WILKINSON. You, gentlemen, to whom have been delegated this highly pleasing duty of protecting the railroad men, I presume will take into consideration the fact that with the devices shown here at the present time our death ratio and our ratio of injuries are larger at the present time than they were before any of the new types of couplers came into existence.

Mr. HAINES. Will Mr. Wilkinson permit me to add one word to my statement?

Mr. WILKINSON. Yes, sir.

Mr. HAINES. I said in my statement that up to the time that 50 per cent of the cars were equipped with this type of coupler the danger would not diminish, but that after that time it would decrease.

The CHAIRMAN. You claim that there is more danger at present than there has been heretofore?

Mr. WILKINSON. Yes, sir.

Mr. HAINES. It has increased, has it not?

Mr. WILKINSON. Yes, sir. My opinion as one of the representatives is very different from some of those of my associates. Still, I believe that as the master car builder is not a practical railroad man, he does not go out and test these couplers from time to time, he is not, perhaps, in as good a position to find out the true condition as a man really engaged in that part of the service. I will say as to Mr. Haines's statement with reference to the composition of his committee, that I happen to be personally acquainted with these gentlemen, and know that they are all practical railroad men; that is, they all served at one time in the humble capacity of brakeman, but it strikes me that if the kind of coupler has not at the present time been put into service, it would be a good thing to have a certain number of men act in conjunction with the gentlemen he names, and, if you please, this committee or representative men that they could appoint, some of us who were disinterested. The idea as it presents itself to us to-day is that all of the railroads have a perfect right to equip their cars with any particular device they see fit. If anybody hands them a good patent, something that they believe is going to be the thing that they want, and that all the railroads will have to adopt, they will buy a certain interest in it. They will equip their cars, and those cars will come in contact with others that do not couple. Then it becomes necessary to couple two of those patent

devices together, and then the danger is increased proportionately. It is also a true statement that the labor connected with these men who are engaged in active service at the present time is increased each year about 1 per cent.

The amount of work that was done five years ago by an engine is now almost doubled. The work that was performed by one switchman five years ago, to-day is necessarily double. The pay has been proportionately increased.

It has been my misfortune to call upon several of the representatives of railroads in the last year asking for an increase of wages. This is the manner in which our proposition was answered: "Well, you men have been engaged in a political movement to get us to buy a certain kind of coupler. Now we are going to use the money that we ought to give to you to buy the coupler." So that we claim under those circumstances, if the President of the United States, if you please, and this particular committee, or all the humanitarians in the human race see fit to protect the interests of those who have been railroading for a number of years and have not been sacrificed up to the present time it is not fair for these railroad managers to say now, "if they make us adopt measures of that kind you will have to pay for it." That is one of the things we labor under as an organization at the present time.

This is the first time we have ever appeared here asking for anything.

The CHAIRMAN. You mean to say that the railroads intimate to you that if you gentlemen insist upon legislation looking to the adoption of a safety car coupler they will reduce your wages in order to make up the amount which it costs them by such legislation to pay for the couplers?

Mr. WILKINSON. I stated that the labor had been increased and wages increased correspondingly. But in many instances during the past year I called on general managers and they said: "There is a movement of this kind on foot that we attribute to you men. If that is carried out we will have to take the money that we give to you and put it into this equipment that we will be compelled to put on." So that if they do put on the equipment we will have to pay for it.

The CHAIRMAN. Let me ask you another question. Suppose this automatic coupler, or some such coupler, were adopted by all the railroads, and also the air brakes, what would it result in as to the employment of men who have heretofore been doing this work; would it reduce the amount of labor necessary to run a railroad?

Mr. WILKINSON. I do not think so.

The CHAIRMAN. I have heard some one intimate that it would, but I do not know what the fact is.

Mr. WILKINSON. The statement has been made by some of the men who have been identified with this association that whenever you have all automatic couplers to power brakes they will not need any brakemen or switchmen. But I have had enough experience to satisfy me that it does not make any difference whether you have an automatic coupler or not, you have to have a man who has a good head on him and a good deal of ability to uncouple them successfully. And there are many times when the air brake refuses to work when you use the old Armstrong or the hand brake. So that I do not

think that there will be any decrease in the number of men employed, but I would judge that if they are more intricate than they are at the present time it would have a natural tendency to increase the number of men, because if things are favorable you can remove a pin in the old link and pin with very little slack and do it very quickly.

There are many things that could be done to better the condition of the man who works for a railroad. There are a great many of the general managers who have done a good deal to the betterment of the men's condition, and we have always met with a great deal of fairness and we have been largely benefited. But we believe we have also largely benefited their service in this country. Still, we are not in a position to-day to say what any railroad company shall adopt as an automatic coupler. We do not believe anybody is in a position to-day to dictate to them what it should be, but we believe in order to amicably adjust this mater within a reasonable time that a committee of practical railroad men, men who have been switchmen for twelve or fifteen years, be appointed, and if they have an opportunity to test these appliances after they have been passed upon by the committee spoken of by Mr. Haines and also recommended by the master car builders, they would know within a reasonable length of time whether the device was a practical one or not.

Senator Hiscock. Do you think a committee of that kind would be more valuable than the association together of half a dozen of the most skilled mechanics, especially in respect of railroad appliances, whose business it is professionally to devote their whole time to the examination of every new device, and as far as they can to improve on those devices, and the railroads, as fast as they materialized something that they thought was an improvement, testing it?

Mr. Wilkinson. Yes, sir.

Senator Hiscock. You think it would be better than that?

Mr. Wilkinson. Associated with the gentlemen that you speak of, as an inventor——

Senator Hiscock. I am not speaking of an inventor. I am speaking practically of a commission, a bureau being organized that will take up all inventions, all devices for the improvement of couplers and brakes and everything connected with railroad transportation, examine them, and on their report have the railroads put those appliances or devices into use and test them by actual use.

Mr. Wilkinson. As far as the coupler is concerned: yes, sir.

Senator Hiscock. Would this committee that you speak of be any better than the brakemen themselves who use it?

Mr. Wilkinson. No. I would take my choice from the men actively engaged in the service of railroads, some railroads; a man who was constantly connected with coupling and uncoupling them each day.

Senator Hiscock. That is what I suppose they do. If they take the cars with these devices and put them on the roads with a view of testing them, the results reported carefully and accurately, and whenever it is impossible to devise an improvement that it should be the business of these men to devote themselves to the study, at least, to see if they can improve it.

Mr. Wilkinson. I have been in the service twenty years, but I have never seen a committee of that character in my life.

Senator HISCOCK. I think you will find that there is just such a bureau as that in the New York Central system, in the Pennsylvania system, and in several other systems, and notably such a bureau as that which is created by these large car-building establishments.

Mr. WILKINSON. The Pennsylvania has got an equipment, with the Delaware, Lackawanna and Western, which has cut off more arms than anything of the kind on earth.

Senator HISCOCK. I am not speaking of that. I am coming down to the question of whatever they do in the direction of mechanical skill, if they do anything for the purpose of correcting just that. It always seemed to me that if they acted in good faith, if there were organized by a railroad system, or by railroad systems combined, a force of skilled machinists and mechanics whose sole business it was to investigate every invented device they could learn of and improve on it themselves, and if the railroads devoted themselves to testing those improvements, that there was hardly anything better than that that could be done in the way of a commission.

Mr. WILKINSON. It has been always the truth that there has always been a difference of opinion amongst men. My proposition is that if a man puts in fifteen years of his life as a practical switchman, and does not engage in any other service, that he is one of the most competent persons to judge of any adaptability in the line of switchmen of any other person in the world.

Senator HISCOCK. I believe with you that a practical switchman, taking two devices, would be the best judge as to which one he could operate with the greater facility and safety, and yet he might not have the least genius in the world for creating or inventing the device in the first instance or suggesting any improvement to it. Now, as I understand it—I may be mistaken about it—some of the large trunk lines that I have mentioned have had organized in their service a bureau of mechanics. They have had a force who were employed at nothing else, and as soon as they had perfected as far as they could a device or machine it was put on the cars and tested by actual operation, by actual service, by men who are just what you describe, practical brakemen and practical switchmen.

Mr. WILKINSON. These air-brake cars are sent over the road under the management of a direct superintendent for the purpose of educating the men as to the action of air brakes. But so far as couplers are concerned, I have never visited a test and never heard of one.

The CHAIRMAN. Have you anything further to say?

Mr. WILKINSON. I believe that covers all. We are very anxious that something should be done at as early a time as it is practicable.

The CHAIRMAN. As to exactly what that time is you are not prepared to say?

Mr. WILKINSON. No, sir; nor to make any suggestions. But the sooner the better.

Senator HITCHCOCK. Have you ever yourself put into form the legislation that you would propose?

Mr. WILKINSON. No, sir; I do not believe I have the ability to do that.

Senator HITCHCOCK. I might say that I never saw anyone whom I thought had.

Mr. WILKINSON. I agree with you on that proposition. I have one other expression to make.

Senator HITCHCOCK. I am glad we agree on that question, because that has always been the trouble, so far as I am concerned.

Mr. WILKINSON. We are paying $37,000 a month to disabled brakemen and to the heirs of those who are killed. That is the amount we are paying each month at the present time, and instead of it decreasing each year it is increasing, so that the sooner some legislation is enacted in that direction the better. Anything that can be done to better our condition will not only be appreciated in so far as the saving of our lives and limbs is concerned, but in saving the small compensation which we receive for our services.

Senator HITCHCOCK. Let me ask you one other question, and I think that will be all. You have been connected with railroads in your present position for the last twenty years, which would make you pretty familiar with it. What do you say about the promptness with which railroads—I will say trunk lines that are able to do so; I imagine there are a great many small railroads built in some sparsely settled country which can not; but so far as corporations that we know of in the East, the Pennsylvania road, the New York Central system, and the New England system—adopt new appliances? How promptly could the new appliances, after they have been tested, be put on the cars at the shops where the cars are built? What do you say about improvements in that direction within your own knowledge, say within five years?

Mr. WILKINSON. The Pennsylvania has made some improvements in that direction in the past five years. I can not say as to the New York Central; but if they have not, it is high time they did. They have some of the poorest rolling stock in the United States. The roads west of the Missouri River—the Missouri Pacific, the Northern and Southern Pacific—have adopted all the appliances within the last five years; within a year after they were perfected and put in use.

Senator HISCOCK. I asked that question because I have heard it stated by railroad men, I think in this committee, that there was no valuable invention for the saving of life and limb, that had been reported upon by competent people or had been discovered, where the railroad companies were able to make the change, that they did not do so.

Mr. WILKINSON. The Pennsylvania has adopted the block system, I think, over all its lines.

Senator HISCOCK. I said I heard that statement made—that they did go just as fast with these improvements as they could under the circumstances.

Mr. WILKINSON. As far as air brakes and automatic couplers are concerned, as I have stated, the roads enumerated have been the first to take them up. I would like to ask Mr. Haines if the Northern Pacific, the Missouri Pacific, and the Texas Pacific are members of your association. I have been given to understand that those three railroads at present are adopting what is known as the Safford drawbar at the rate of 1,200 per month. The statement was made by Mr. Haines as to their being a party to the interchangeable couplers that were presented here; and the Santa Fe is also putting on the old link-and-pin.

Mr. HAINES. That company is not a member of our association.

Mr. WILKINSON. The Santa Fe?

Mr. HAINES. No, sir.

Mr. WILKINSON. The Northern Pacific, Missouri Pacific, and Texas Pacific are?

Mr. HAINES. Yes, sir.

Mr. WILKINSON. I have been informed that they are putting on 1,200 of the old-fashioned drawbars. It is a new kind of an old-fashioned bar, known as the Safford bar.

The CHAIRMAN. Is it better than the old one?

Mr. WILKINSON. I am not in a position to state. Mr. Safford is here, and I am not working for any drawbar company. That has been a handicap for all men connected with this association. If they say anything connected with the drawbar they are accused of getting a certain per cent from the association. We have all been approached, but we have not got any money yet, I am sorry to say.

STATEMENT OF FRANK P. SARGENT.

The CHAIRMAN. What is your relation to the railroad business?

Mr. SARGENT. I am grand master of the Brotherhood of Locomotive Firemen.

The CHAIRMAN. Where do you live?

Mr. SARGENT. Terre Haute, Ind.

The CHAIRMAN. Please proceed to state what you think about this general subject, whether Congress ought to pass any act at all, and if you know what kind of an act you think should be passed, please tell us.

Mr. SARGENT. It is very evident to-day, Mr. Chairman, to one who associates and converses with the masses, that the time has come for national legislation looking toward the adoption of proper appliances upon the railways of the country for safety to life and limb.

It is not my purpose to speak of the feelings that exist throughout the country in that direction, because it is manifest to everyone that all have a kindly feeling for each other. But this question is one of grave importance and one that requires careful consideration, and I have yet failed to see in the many bills that have been presented to me the solution of this question.

National legislation, in my opinion, is to come, and it seems to me that what ought to be considered first is the proper steps to be taken by Congress in that direction.

We have heard to-day from some of the able representatives of the railway interests of the country as to the appliances which are now in vogue. We also conversed with the representative employees of the service, and they all tell us at this present time there is not a safety appliance as a coupler that meets the requirements of the service. Therefore, to introduce a bill into Congress to-day making a certain type of coupler the standard, and compelling the railroad companies of this country to adopt it within a specified time, in my opinion, will be an injustice to the corporation and an injustice to the employees. But I believe the first step necessary on the part of Congress in that direction is to find a means to determine what the best appliance is, and, when that has been determined, then act in conjunction with the railway employees, the railway officials, the masses at large, in having that particular device adopted.

The CHAIRMAN. Now please tell us how to find it.

Mr. SARGENT. The suggestion I have to offer is this, that a bill be introduced in Congress providing for the appointment of a commission, that commission to consist of a number of practical railroad men taken out of the service, and a number of practical railroad officials representing the roads themselves, and let that commission be empowered with authority to hold tests, to call for these gentlemen who have this innumerable number of devices, all claiming to be just the thing needed; let them equip cars, put them into service, and let it be demonstrated beyond a doubt as to whether that particular device is the proper one or not. When that is arrived at, then Congress can pass a law requiring the adoption of that particular device within a specified time.

It does not seem to me that it would be just to-day to the railroad employees, to the railway managers, and to the public at large for Congress to introduce a bill, and pass it, compelling a certain coupler to be adopted, when no one knows that there is a coupler to-day that has the requirements in every particular.

I have had some little experience in railroading. I come in contact constantly with the employees day after day, and the general expression of the men in the practical service is, the thing that we want has not yet come.

It is very manifest from the position taken by the president representing the railroad associations to-day that they are adopting a certain plan or a certain style of coupler, and yet upon his own statement he admits that that is not yet sufficiently carried forth as to be warranted in making that the universal coupler.

Now we want legislation. The masses demand it. They are appealing to Congress for it, but we want to be fair to the men who own the property where we are employed, and we do not want to force upon them a device which has not been tested and proved to fill the requirements of the service.

Therefore, Mr. Chairman and gentlemen, I take this position: That the step necessary on the part of Congress is to provide a measure whereby a commission of gentlemen can be selected who can make these tests, and when they have made these tests and have themselves specified that they have gotten an appliance that meets the requirements not only as to the saving of life and limb, but from an economical standpoint—that wants to be considered also—then report back to Congress or to the Interstate Commerce Commission, or whatever may be designated, and that time will be the proper time to pass an act compelling the adoption of that device.

The CHAIRMAN. Suppose the commission was created for the purpose you indicate. How would that commission be expected to find out what the best device was?

Mr. SARGENT. The suggestion I would make would be this: That this commission, after being clothed with authority, request that a certain number of cars be equipped with these several devices, go into some yard where there are intricacies of switches, curves, grades, and put them into practical operation. Let that commission be composed not only of men in actual service, but men who are in the mechanical department of the railroads, master car builders, and men of experience in design and invention, and there and then test those appliances to their satisfaction in all the different ways that can be thought of, putting them to all tests, and when they have found the most prac-

tical, the most economical, the most life-saving one, I feel satisfied in saying it will meet with universal approval, and very little legislation will be necessary to have it adopted.

I take this position today: It is just as much to the interest of the railroad managements of this country to have safety appliances as it is to the employees, and more so, because when employees are injured they get the condemnation if they do not have safety appliances on their equipments every time.

They are looking in that direction. We can see statistics here to-day which they have given us to show they are moving in that direction. Now, the employees ask you to act on this movement in a judicious way. We do not want to do anything unjust. We want to be fair, but we want to hurry this movement forward. We believe a commission should be appointed by this Congress, or an act rather should become a law at this Congress providing for a commission in some way.

Let these tests be made. Let the commission make a report, and when they have made their report, in our judgment, we believe the solution will be solved and the appliances will be found that will meet the requirements, and they will be put on. That is my position, and that is all I have to say.

The CHAIRMAN. You seem to be at the head of the Brotherhood of Railway Firemen.

Mr. SARGENT. Yes, sir.

The CHAIRMAN. Have you had any relations to the switching business?

Mr. SARGENT. I ran a switch engine for some months, and worked in the yard with the men.

The CHAIRMAN. Do you reflect the sentiments of the men themselves who are engaged in that special calling?

Mr. SARGENT. I am not speaking for the switchmen; I am expressing my own sentiments and the sentiments of my colleagues with whom I come in contact, and I form my opinion from conversations I have had with men who have traveled over the country. I am not speaking for any particular body of men. That is not my purpose. I was invited here to give expression of my views.

The CHAIRMAN. The reason I make those inquiries is because I want to find out whether you are familiar with the business, and whether, in the light of your own knowledge on that subject, you believe the suggestions you make are the right ones.

Mr. SARGENT. I will tell you why I believe my suggestions are right with regard to the commission being composed of practical men out of service as well as those who have control and management of the railroads, in order that no one may raise the question that there is any partiality shown towards any particular device on account of the financial backing which that device has.

I am speaking for the employees, and I want them to feel confidence and have confidence and feel assured that their interests are being protected. The railroad employees of this country to-day are looking to you, gentlemen, who have come here, who in a measure represent their interests, and when they feel confidence in what is being done, let men be selected from the rank and file who do the work to act in conjunction with the men who might be selected from the management of the roads to apply these tests.

The CHAIRMAN. You can understand that if we carry out the suggestions you make we would pass a bill for a commission at this session, and at some future time we would probably be required to enact some additional legislation before we would get to the point of settling what should be done by the railroads, and in the meantime the killing of these men and their injuries would go on, and you think that would be going as rapidly in the direction of protecting the employees as they would think we ought to go?

Mr. SARGENT. Yes, sir; taking into consideration the expressions of the men that there is not a device in existence to-day that meets the requirements, and it being the object of Congress to pass a bill compelling a certain type to become the standard and forcing the railroad companies to adopt that within a specified time.

The CHAIRMAN. Suppose, when we passed the bill, there is no new device. Then what will we do in order to meet the requirements?

Mr. SARGENT. If you have a commission composed of practical men with a mechanical understanding and knowledge, if there are any of those devices that are put to the test that do not meet the requirements, it can be pointed out wherein they are defective. We have had presented to us to-day elaborately a certain type which has been considered practical to a certain extent. They are recommending and adopting it throughout the country. It is applied in the manner I have described, but the question is whether it is practical or what necessary changes could be made in order to make it so. I do not feel that the delay of one session of Congress in the matter of passing this bill would be detrimental to the masses at large. First, I believe in finding out what you want, and then passing legislation compelling its adoption. Do not compel the adoption of something before you know whether it is what you want or not.

The CHAIRMAN. I ask you the question more especially because at a previous session I introduced a bill providing for a commission, and it was regarded by the country as not the best thing to do. So we have been going along trying to find out what was the right thing to do up to this present time, and we have not yet found out to a certainty.

Mr. SARGENT. I am simply expressing my views as to what I believe would bring about the most practical results. That is only my opinion, and I believe that the railroad employees should be the men who ought to be considered in this legislation.

I am sorry that there are no more railroad men right out of the ranks. What I mean to say is everyday men, men with their hands begrimed with toil, working and handling these cars, who can explain these points that they observe every day. They are not here. I can not speak for them as they can speak for themselves, but I believe when a matter of this importance comes up and you talk of national legislation compelling the adoption of a standard coupler those men should have something to say about it before that law is enacted.

The CHAIRMAN. I thought so myself. Mr. Downey, I believe you are one of those men?

Mr. DOWNEY. I believe so, sir. You can take a look at me, if you please, in order to confirm that. [Exhibiting his hands.]

STATEMENT OF JOHN DOWNEY.

Mr. DOWNEY. Mr. Chairman and gentlemen of the committee, the desire of the switchmen as they have expressed it before conventions on three different occasions was uniformity in the coupler. It does not make any particular difference to them what coupler is adopted. At least they did not express any desire for any one that was in the market. They simply desired some coupler of uniform kind to be adopted by all the railroads. I agree with Mr. Sargent in regard to the proposition he has made that a commission be appointed or a bill be drafted and put through Congress for a commission to test these various drawbars, but in so far as the composition of that committee is concerned I do not believe the switchmen care who compose the committee, even if it is composed wholly of general managers, wholly of car builders, or if it is composed wholly of members of Congress. It does not make any difference to the switchmen so long as a uniform coupler can be adopted, so that the conditions can be known to the men who are at work.

Take a drawbar on cars. They are a good deal like a mechanic's tool to the switchman. If he understands just what he is going to find on the car his danger is lessened to a great extent. But if he finds every different kind of a drawbar there he does not know the moment he will lose his hand or arm, or even his life.

I do not here desire to advance any theory or anything of that description, and I am not here for that purpose. My practical ideas on the subject are simply that uniformity must be observed in regard to the coupler question, and the sooner you get to that part of it the better it will be for the men who are employed in the business.

We are paying to-day in the neighborhood of $16,000 a month for deaths and total disability in the organization.

The CHAIRMAN. What organization?

Mr. DOWNEY. The switchmen's organization, the men who do the coupling.

The CHAIRMAN. I think it has been testified here that the Locomotive Brotherhood are paying over $30,000 a month.

Mr. DOWNEY. They have an organization composed of brakemen, switchmen, and baggagemen, and several other classes in the railroad service, while we are composed wholly of switchmen and are paying in the neighborhood of $16,000 a month for death and total disability claims.

The CHAIRMAN. Are you paying that out of your own pocket?

Mr DOWNEY. Yes, sir. Out of the wages that the men draw they pay a pro rata assessment on each death.

Another obstacle for them to contend with is the condition of the tracks in the yards. The frogs are not cleaned and the guards are not cleaned, and various piles of rubbish are allowed to lay around in the various yards of the country and a switchman has very little chance to escape, so that when he goes to work in the morning he does not know whether he will come back alive at night or not.

That was the position I held for nineteen years while I followed the business. I went out in the morning, expecting to come back on a shutter.

The CHAIRMAN. You did not come back maimed all the time?

Mr. DOWNEY. I came home maimed four different times, but they did not kill me.

The CHAIRMAN. Where do you live?

Mr. DOWNEY. Chicago. I have resided there thirty-three years.

The CHAIRMAN. Is there anything in the question of the length and height of the drawbar?

Mr. DOWNEY. They want it uniform all around, height, style, and everything in connection with it.

The CHAIRMAN. What you want is uniformity?

Mr. DOWNEY. Yes, sir; what we want is uniformity.

The CHAIRMAN. So that the cars can be interchanged without difficulty and without endangering life in trying to have it done?

Mr. DOWNEY. I do not know in regard to interchangeability, but if they would adopt one type of drawbar there would be no need of interchangeability.

The CHAIRMAN. Would you think it would or would not be wise to pass a bill providing for a commission to determine anything, or would you prefer that we should provide uniformity by act direct?

Mr. DOWNEY. I think if you could provide for uniformity by act direct it would be the best thing possible. It would get around this business sooner than it would by a commission being appointed. If you have got the power to provide for an act direct, I believe that would be the best way.

The CHAIRMAN. Of course Congress will not undertake to legislate as to a particular kind of coupler. We do not know anything about those devices particularly; but if a device could be so described or there could be such a use of language as to require uniformity in the use of couplers, air brakes, etc., and at the same time leave the railroads open to determine for themselves, it might be done by act without any commission.

Mr. DOWNEY. We are willing to allow a board of railway managers to sit on the business.

The CHAIRMAN. The switchmen are not particular as to how it is arrived at so that uniformity is brought about?

Mr. DOWNEY. No, sir; they do not care who sits on this commission or who acts on this committee that is going to test the apliance.

The CHAIRMAN. Our friend, Mr. Sargent, stated a while ago that the general understanding was that there was no device that was satisfactory now.

Mr. DOWNEY. I guess there are about one hundred. If there were only one of them satisfactory the other ninety-nine could be thrown out.

The CHAIRMAN. You think the adoption of any one of them would be fairly satisfactory?

Mr. DOWNEY. It would lessen the danger 90 per cent.

The CHAIRMAN. Is it or not so that as things are now, this mixing of different types, the danger is more than it was before?

Mr. DOWNEY. It makes it a good deal more dangerous.

Mr. KING. Mr. Chairman, I would like to ask Mr. Downey a question.

The CHAIRMAN. You may do so.

Mr. KING. I would like to ask you, Mr. Downey, if the couplers of the Car Builders' type do interchange or couple regularly when they come together or not?

Mr. DOWNEY. With very many in this country you can not unless you use the link and pin, and it is difficult to couple the same type in several yards. I have coupled them only a year ago.

Mr. KING. What is the trouble?

Mr. DOWNEY. I do not know. It is an impossibility for anybody to tell. They look all right, but they will not lock. It is impossible to bang them hard enough together to get them to lock. Then you have to use the link and pin.

Mr. KING. Do you often have to use the link and pin where there are two different kinds of Car Builders' type?

Mr. DOWNEY. Often. I did on the west-bound for the Pennsylvania at Fifty-fifth street. I guess on one coupling out of every five of the Master Car Builders' type I would have to use the link and pin to couple it.

The CHAIRMAN. Does the switchman have to jam them together himself in order to lock them?

Mr. DOWNEY. The engine forces them together.

The CHAIRMAN. On two different cars coming together?

Mr. DOWNEY. Yes, sir. You have to go in to nine-tenths of them to open them in the first place. They are not automatic, as they seem to be. You have to raise up the lever and have to reach in to open the knuckle in order to couple them.

The CHAIRMAN. If that is so, what good would it do to put them on any car if you can not lock them together except by going between the cars? That is what we are trying to avoid.

Mr. DOWNEY. There are some of them that open automatically, but the majority of them will not—not far enough to allow the coupling to be used.

The CHAIRMAN. Your judgment is that that is not a good coupler?

Mr. DOWNEY. I am not speaking of any particular coupler at all, but am simply stating my opinion.

Mr. LAKIN. Is it not a fact that a car that is loaded coming in contact with a car of the same kind that is light is the cause of their not coupling?

Mr. DOWNEY. I never had time to stop and examine.

Mr. LAKIN. The difference in the height of the car, I should presume, might make some difference.

STATEMENT OF AUGUSTUS D. SHAW.

The CHAIRMAN. What is your relation to railroads?

Mr. SHAW. I am not in the service at the present time, but I have served as a brakeman, conductor, and yardmaster for twenty-six years.

The CHAIRMAN. Were you ever a switchman?

Mr. SHAW. Yes, sir. That is, what we call a switchman; a yardman.

The CHAIRMAN. Where do you live?

Mr. SHAW. My home is Indianapolis, Ind. I am residing here at the present time. Two years ago I resigned my position as assistant yardmaster of the Big Four Railroad at Indianapolis, Ind., since which time I have been in the Government service.

When I left the yard ten nights previous to my coming here I laid down the link and pin to accept a position under the Government. I promised the men in the yard there whom I left that whenever I had

an opportunity to say anything pertaining to their welfare with reference to this mater of safety appliances I would make it my business to perform that duty. Since I have been here I have been before this committee once before. I have appeared before the House Committee on Railways and Canals, and I have been before the commission that was appointed which met at New York last November. I was instructed by the president of the Yardmasters' Association to appear here at this meeting and express to the members here present their views, which are my own, in reference to this matter.

I have always seen the necessity of a uniform system of drawbars being provided for. Gentlemen, as I said before, my life has been spent in that business and in the most hazardous part of it as a switchman. Ten years of that time has been spent in switching in the yards. I know the dangers pertaining to that, and you have before you one who has passed twenty-six years of that service who is living. I will not say that I have escaped without receiving injuries. I have had portions of my fingers taken off; I have been squeezed; I have had a part of my elbow nipped off: I have been in collisions; I have been thrown from cars and squeezed between the bumpers, and therefore I speak as a practical yardman, knowing something of the dangers of this business.

I was down at Indianapolis a year ago and of course I made it my business to go among the boys again to meet with them. That class of men I have associated with the most of my life. Almost the first words those men asked me were:

Shaw, what are they doing down in Congress in reference to safety appliances?

Here is Bill Gray, last night, who just got his arms smashed off.

There is John Jackson. We want you to go over and see him. He got his foot cut off in a coupling between an automatic coupling and a link-and-pin coupling.

Those were some of the first expressions I heard among those men. I told them that I believed that Congress was in earnest in this matter, and I knew to my knowledge that they were taking evidence and listening to the views of railroad men on this great question, and that I believed they were earnest and felt disposed to do something in reference to this matter.

They feel the need of legislation. They need it, and they ask for a uniform drawbar, a uniform system of coupling, and they ask Congress to provide and make a law to that effect. The Yardmasters' Association, which I represent here to-day, have asked me to make that statement—that they want uniformity, and they want legislation by Congress to that effect.

Of course I have my own theory about how that should come about in reference to the drawbar question. I want to state right here, gentlemen, that I would first pass a bill making uniformity, and then let the drawbar be selected afterwards. That is where I differ from Mr. Sargent on that question. He and I agree on a great many points with reference to it; we want uniformity and we want legislation by Congress. I believe in passing a bill making uniformity a law, and hereafter selecting a drawbar; in a bill that six months after the passage thereof I would provide for uniformity, and at a certain date and a certain place representatives, say two or three of each of these labor organizations in the railroad service, engineers, firemen, brake-

men, switchmen, conductors, trainmen, yardmasters, should meet with a committee of the master mechanics, master car builders, and general managers, and then and there select the kind of device to place on the car. That is what I favor. That is what they want.

If you gentlemen could have seen what I have seen during my life in reference to these matters, the suffering and the dangers which these men have passed through, you would think it was high time that something should be done in the way of giving these men protection in their dangerous duties; and I speak as one who has gone through these great troubles that these men are suffering.

That is about all that I have to say, unless you desire to ask me any questions. I only express myself this way, that they are in favor of uniformity and that they are in favor of legislation by Congress to that effect. It is not so much the kind of a drawbar as it is a uniform system of coupling.

Mr. MOSELEY. I wish to make a statement. Mr. Spencer Smith has asked me, as secretary of the committee on safety appliances, to hand to this committee a bill which he asks to have introduced, and which is his contribution to this matter. The bill has been prepared by Mr. Smith, has received the sanction, so he states, and as I understand, of Mr. Rodgers, and also of Mr. Hill, who are members of this committee of which Mr. Crocker, whom you heard this morning, is chairman. I simply want an opportunity to present that bill.

At 4 o'clock p. m. the committee adjourned until Wednesday, March 2, 1892, at 10 o'clock a. m.

WASHINGTON, D. C., *March 2, 1892.*

The committee met at 10 o'clock a. m., pursuant to adjournment.

Present: Senators Cullom (chairman), Hiscock, Chandler, Wolcott, Higgins, Harris, Gorman, Jones, and Barbour.

The CHAIRMAN. We will hear Mr. King first.

STATEMENT OF JOHN H. KING.

Mr. KING. Mr. Chairman and gentlemen of the committee: I desire to give the committee the result of my investigations and the conclusions which so far I have been able to reach, and to say to you how the situation looks to me and what, it seems to me, the remedy under the circumstances ought to be. I think Mr. Moseley said something to you about his experience in relation to this coupler question, and I desire to talk on that question only; the other matters are quite simple in comparison with it. The anxiety of the people in relation to this most important question need not be discussed, nor the necessities of the case stated, because you are all familiar with these facts. We are killing a man and wounding about twenty every day under the present system. I think Mr. Moseley also quoted Judge Cooley. I could not help thinking how like my own their experience was in this respect, for when this question first came up and I began to investigate it, it seemed to me that the situation was just exactly like the statements made to you as to how it is now and in relation to what they were doing—that is, that it would soon solve the problem itself.

Mr. Haines in his talk, and some other gentlemen, would have you believe if this thing is let alone it will take care of itself and solve itself very soon. Whether that statement is born of the wish that

nothing be done and that they want to be let alone or not, I will leave for others to determine: but instead of its becoming more simplified and there being more likelihood of its being settled than ever, it looks to me from my standpoint that every day it is getting further from a settlement, getting more complicated and more complex and killing more people, and that in the trend of affairs it must naturally get worse.

Senator HARRIS. Is it true that they are applying this type of coupler, known as the Master Car Builders' type of automatic coupler, to 30,000 cars a month?

Mr. KING. I tell you how they get that, Senator. Here is a road that will order a great many couplers. Take the Sault Ste. Marie, which is managed by as good a railroad man as there is in the United States, Mr. Underwood, whom I have known for many years. They purchased the Master Car Builders' type and equipped all of their cars with it. This was set down as so many couplers "sold and used;" but they discarded the couplers and they are now out of use. That is the way they obtained an estimate.

Senator JONES. Was not that true?

Mr. KING. They bought the couplers, but they are set down as being "in use." Every one of his cars were equipped with it, and every one of them has been taken off and piled up as old iron, because he says they are a failure. Those are marked down as being "in use," and when the car couplers go out as sold they are marked down as being "so many cars equipped," and when they go out of use there is no means of telling how many have been taken off of the cars. That is true all over the country.

Senator HARRIS. Mr. King, is the committee to understand that the railroads of this country are purchasing 30,000 of these couplers a month to be piled up as old iron?

Mr. KING. Yes, sir; some of them are doing it. The men will not have them. They can not use them.

The CHAIRMAN. Why not?

Mr. KING. Because they will not work; they will not interchange.

Senator JONES. They ought not to be used if they will not work.

Mr. KING. The truth is that they will not interchange with other car couplers; they will sometimes. They will work and interchange, and then in the next few hours they will not interchange.

Senator HARRIS. Do they or do they not interchange with each other?

Mr. KING. No, sir; they will not all the time. I do not speak of this because I am in favor of or against any coupler, but I am speaking of this as the trouble that stares me in the face in attempting to come to a conclusion about the matter. For instance, I will read here a letter from the general manager of the Flint and Pere Marquette Railroad. In speaking about that he says:

> I must say, however, that the large moneyed interests which certain railroad men have in particular types of couplers will prejudice the selection of a coupler when voted upon by the various railroads in interest, and that the result aimed at—i. e., the safest appliance for protecting the lives of railroad employees, may not be reached on that account.

That is from Mr. Baldwin, the general manager of the Flint and Pere Marquette Railroad Company.

I speak of this not because I have come to a conclusion or have settled in my own mind upon any particular coupler, but here is one rail-

road company, with their money invested in a coupler; of course they do not want to throw it away. They think that will do as well as any other.

The trouble with the Master Car Builders' type is that there are so many different types and kinds that when they come to interchange they will not work. That is the trouble that we have found.

The CHAIRMAN. So many different kinds of the Master Car Builders' type of coupler?

Mr. KING. Yes, sir.

The CHAIRMAN. They are not all alike?

Mr. KING. No, sir. When they are new and everything is all right and the circumstances are favorable and at some particular times the men tell me they will couple, but they say that here is a car or two cars equipped with the Janney and the other with the Gould, and those two cars will sometimes come together in the same day and they will couple all right, and the next hour or so they will not do it, and the men will have to put their hands in between to make the couplings. Sometimes they do and sometimes they do not couple, and they can not exactly tell why, but the fact is they do not work.

Senator JONES. Are you a railroad man?

Mr. KING. Only by being a railroad commissioner. I have been interested in this question for a good many years.

Senator JONES. You have had no personal experience with railroads?

Mr. KING. No, sir.

Senator HARRIS. What is your remedy for the evil?

Mr. KING. I will try to give you that. My remedy is that some particular type of coupler must, in some intelligent way, be settled by some power other than those directly interested in that coupler.

Senator JONES. Have you any interest in any coupler?

Mr. KING. None whatever in the world.

Senator JONES. You come here as the representative of nobody but yourself?

Mr. KING. I am a member of the committee on safety appliances of the national committee of railway commissioners.

Senator JONES. Do you come here as a representative of that committee?

Mr. KING. Yes, sir; just the same as Mr. Crocker and other gentlemen. I have not a particle of interest, either directly or indirectly, in any coupler.

The CHAIRMAN. You say you are a member of the committee of which Mr. Crocker is chairman?

Mr. KING. Yes, sir.

Senator HARRIS. You say that couplers of this type will not interchange?

Mr. KING. Yes.

Senator HARRIS. The understanding of the committee has been that the coupler of the Master Car Builders' type has in the last few years been very largely used and that there were from 175,000 to 200,000 cars equipped with them and that they would work interchangeably.

Mr. KING. You must understand that there are some forty or fifty of these types.

Senator HARRIS. There are various specific devices all understood to belong to that type?

Mr. KING. Yes.

Senator HARRIS. You say that will not do; that you have to be more specific?

Mr. KING. Yes, sir.

Senator HARRIS. Does not your theory bring it down to the adoption of a specific coupler?

Mr. KING. It does. That is the difficult problem that you have got to solve, and until you do it in a disinterested, intelligent way, you can not keep from killing the men as long as you have this great variety of couplers.

I have looked over this matter, and, as I said, Mr. Cooley and Mr. Moseley gave me their testimony, and it was this: They thought this was going to settle itself easily years ago; that it was going to be the Master Car Builders' type. The more we got into it the more complex it became because of the varied interests. The Atchison, Topeka and Santa Fe will not use the Master Car Builders' type and a large number of other roads will not. The Illinois Central have refused to use it. They say they can not; that it is constantly killing the men; that they would rather have the old link and pin than this multiplicity of type, and until some particular type of coupler is settled upon it is all nonsense to try to do anything at all.

Senator HARRIS. I will ask you if any change from the link and pin to an automatic coupler will not, in the transition stage, necessarily increase the danger to the trainmen?

Mr. KING. It can not be any worse than it is. It would not be so bad if they had only one kind of coupler to contend with. They would know what they had to contend with. As it is, they do not know whether it is a Gould or a Janney or a Hinson, or whether it is the automatic link and pin, or the old link and pin, that is coming. They have to make these couplings at night and they do not know what it is, and there is the trouble. If they knew what coupler was being used they could get along. If you had one particular type of coupler they would know exactly what they had to contend with.

In brief, my theory is this: That the only way that you can do and the only way in which this question can be settled is by a commission, which must be composed of railroad men and of others also who have no interest in railroads, because if you took all railroad managers you might get men interested in some particular coupler. If you took railroad employees, who do nothing but couple the cars, it might not be fair to other railroad people. So my theory about this is that it is too big, too intricate a question for Congress to settle, and I will tell you very frankly that I am very much discouraged about getting it settled, and the longer I investigate it and the more I have seen of it and the more testimony I hear about it the more complicated and vexatious and discouraging it is to me.

Why dally about it any longer? You gentlemen can not act intelligently, for it is too intricate a question. Somebody must make a study of it. My theory is—and I have prepared a bill which is identical with Senator Cullom's bill, except the first three sections. It provides that a commission is to be appointed, to consist of seven men (you can make it any number you like), whose duty it shall be first to take the testimony of these railroad companies; take the votes by cars. They will not agree; no 60 per cent, nor 40, nor 30 per cent will agree on one coupler, but take it for what it is worth. Then

take the testimony of the men who couple the cars, and take that for what it is worth. Let them weigh it; make practical tests, and whatever tests they deem advisable and proper, and travel over the country and give the question their attention, and then let them decide.

Then, for fear that there may be some wrong done, for fear that there may be some mistake made by that commission, and it is a very important matter, I provide in this bill that they shall make a report of their conclusions and findings to the Interstate Commerce Commission, after settling all the questions and taking all the testimony of all railroad employees, and of all railroad companies, and general managers, and everybody. It will be a big job; they can do it within a year. Let them make the report of their findings of what coupler they are agreed upon, and they will have no trouble in finding one good coupler. Then let them report to the Interstate Commerce Commission, and if the Commission approve of what they have done, then let the President issue his proclamation declaring the particular stand or type of coupler. If the Commission do not approve I provide for them to report to Congress, and let Congress have the benefit of their experience and investigation.

Then, in order that you shall not be given trouble about monopoly, that no one man who owns this particular type of coupler may have a monopoly and be able to extort from these railroad companies, I provide that each person who brings his coupler to the commission shall file with it a bond stating for what he will transfer his patent right to the United States, or it can be provided, if you prefer, that the royalty shall be only 50 cents a car, or some small amount, so that there will be no extortion, and so that the man who owns the patent can not sit back and say, "You can not use my coupler," he having the patent to it. You can provide, if you prefer, that he shall deed it to the United States, and then make it free, or else provide that the railroads shall use it and the royalty shall be 50 cents, or whatever may be deemed proper for its use.

Then, by that means, you prevent extortion; by that means you come to a conclusion, and a legitimate conclusion, and it seems to me it is the only intelligent way out of the woods on this subject.

You gentlemen want this thing to be done as cleanly and as straightforward as it can be done. Congress is charged with having some job in some particular coupler. Now, this commission will have to assume the responsibility and perform the duty, and it can do it. In order that it may be divested of any job, I provide that the commission shall take testimony and report to the Interstate Commerce Commission, and then if the Interstate Commerce Commission agree with them, the President shall issue his proclamation, and we will have the result of it right away. If they do not agree, the matter is to be reported to Congress for whatever disposition seems to be best from the result of their investigation.

The trouble about this matter, as I have said, is the great interest that has already become invested. The Pennsylvania line, for instance, is using only one particular type of coupler——

The CHAIRMAN. What is that?

Mr. KING. One type. I do not know whether it is the Janney or not.

Mr. MOSELEY. Yes, sir; it is the Janney type.

Mr. KING. Now, then, what they would like would be to compel

every other railroad to use that particular type of coupler. They want to bring every other railroad company to their manner of thinking, and the other companies say, "Our judgment is as good as yours, and we will not come to your way of thinking and you can not drive us." That is the disposition of the railroad managers. They do not want legislation. They fear there may be a mistake in the selection of the coupler or that they will be compelled to throw away their investments. For instance, the Pennsylvania, if some other type of coupler should be adopted, would have to change their cars. The Santa Fe, if some other coupler were to be adopted, would have to change theirs. They use the automatic link-and-pin. They say it is the best. I do not know anything about what is the best. I know there is enough in the record and the investigation we have made and the testimony that has been taken to convince me that there is no man in this country who is egotistical enough to stand up and say, "Here is the identical coupler that will satisfy everybody." I would not want to take that responsibility. If you have that responsibility put upon you, Mr. Chairman, you would discharge the duty just the same as any man would discharge his, and do the best you could, and then we would get a uniform coupler.

This bill, as I say, is the same as that introduced by Senator Cullom, with the exception of the first three sections. I want to say a word to the committee further in relation to this matter.

Of course I know there is a feeling of economy pervading the country at this time, but there is no question before Congress which is as important as this. We are killing a man every day. They all admit that if we had a uniform coupler that would be reduced 90 per cent. Railroad men, employees and all, agree that if we had one automatic coupler that would be reduced 90 per cent. I think that is the uniform testimony.

The CHAIRMAN. The railroads are killing a man a day, and about how many are being injured?

Mr. KING. Twenty a day. They have killed 40 or 50 men since you began considering this question this Congress, and on an average 20 a day have been injured. All of them say the reason is because they do not have some identical, uniform coupler. How are you going to reach that question? No man can intelligently get Congress to say what it ought to be. You would not feel like saying what particular type should be adopted without knowing more about it than you do. It seems to me that it would be folly to ask Congress to settle it. The railroads can not settle it. Here is one railroad manager who practically says I am right. Railroad men are stubborn people. They are intelligent; they are strong. The manager of the Santa Fe says: "I know just as much as the manager of the Pennsylvania." The master car builder, or whoever he is, on that line says: "I know just as much as they do. That is not the thing I want. I want some other type." I think the Santa Fe uses the Safford coupler. I know nothing about the types. They have got their interests established and you can not drive them. They can not agree; they just simply will not agree. You have got to get a jury or some person to sit upon the question and compel them to agree, and you never will arrive at any conclusion until that is done in some way so that they are compelled to agree by some positive statute providing for prompt action.

Two or three years ago I find that the Master Car Builders said

they settled this and that they fixed this and that. I find that while these companies—the Pennsylvania line and a few of those lines—have adopted the recommendations of the Master Car Builders, yet they are manufacturing other types and putting them on all the time. There are certain companies that have adopted that type; but there are others that will not. The Grand Trunk absolutely refuses to use it. There are a dozen or fifteen of the biggest roads of the country that refuse to use it.

The CHAIRMAN. Suppose we should say that there should be a system of coming to a conclusion and providing for the adoption of some specific coupler, how long a time do you think the railroads ought to have in order to comply with the law?

Mr. KING. I think that they would be able to equip from 10 to 15 to 20 per cent per year.

The CHAIRMAN. It would involve the necessity of throwing away a good many couplers?

Mr. KING. Certainly. They are constructing more cars. I think I am right—I have not the statistics to back me up; Mr. Moseley could tell better—I think they are constructing three times as many cars in the United States that have not the Master Car Builders' type as those that have the Master Car Builders' type; while they are equipping one-third of the new cars with Master Car Builders' couplers, the other two-thirds are equipped with different kinds. I tell you that the determination of the railroad companies of the United States to have their own way, each railroad for itself, is three times as strong as it was when I commenced to investigate this thing. The Pennsylvania company have got their million dollars invested in this, and they say they will not use any other. The Santa Fe says the same thing as to the coupler they use. The Grand Trunk say they will not use the Master Car Builders' type. There are railroads by the dozen over this country who say they will not use it, and they stand there with their teeth set and their fists clenched, and that is the situation. They say, "We will fight." You can not get away from that. This has been going from bad to worse. The number of men being killed every year has been increasing.

Senator GORMAN. Where do you get the statistics about that?

Mr. KING. By taking the statistics of 1887 and bringing them right up, you find that the number of killed is increasing—that we are killing one man every day.

Senator GORMAN. Where is that information gathered?

Mr. KING. In all the reports of people killed. We have them here.

Senator HARRIS. At what point is it concentrated?

Mr. KING. In the report of the Interstate Commerce Commission; it is authentic. There is no disagreement about that. They concede that point; they agree.

Senator JONES. That it is getting worse?

Mr. KING. Yes, sir; all the time. There is not a man who can stand up before you and say that is not so.

Senator JONES. Is the number of men killed in proportion to the mileage of railroads increasing?

Mr. MOSELEY. Yes, sir.

Mr. KING. All the time.

Senator JONES. If that is so these improved couplers are doing more harm than good?

Mr. KING. I think the report will show that even the Pennsylvania Railroad, which must handle the cars of other companies, is killing more people now than they were before, by reason of the different cars coming to them with other varieties of couplers.

Senator HARRIS. Will not that necessarily be the case? Even though we should decide to-day that the railroads should adopt a specific coupler, in this transition state, while some of the cars are equipped with one coupler and others with another, will it not naturally increase the casualties on the road?

Mr. KING. I think it would commence to decrease immediately. I will tell you why. Here is the Illinois Central; there are forty or fifty roads that I might speak of which are refusing to put on any automatic coupler at all. They are using the old link and pin. Of course these other cars come to them equipped with the different variety of automatic couplers. As soon as this question would be settled and it was determined what particular type should be adopted, all the railroad companies in the United States and all the car manufactories would begin to equip their cars with that coupler, and in less than one year the change would be very marked; because it is the testimony of the railroad employees and managers that the trouble comes from the great variety of couplers, because they do not know what is coming. All these varieties will immediately commence to disappear, and we would have one particular type. I think the others would commence to disappear right away.

I have talked with these men and they all agree that it would practically reduce it down, some say 80 and some say 90 per cent, if we had one particular kind of coupler. I want to say that there is a large number of couplers not upon any cars that I believe to be just as good as any that have been put upon cars. By reason of poverty the men who have invented them have not been able to get a fair test. The commission which is provided for in my bill, if appointed, could have practical tests made. They would very soon begin to winnow them out. They could take this type or that. They could make tests upon a half a dozen of the best types, and when the tests were made and they finally selected one particular kind of coupler, then you would see all the railroads of the United States adopt it with alacrity. They would say: "We are not contending with the Atchison or the Pennsylvania, but with the action of Congress, with a law," and they would abide by it with all grace and speed.

I present to you the bill which is the result of my careful investigation. It is only good for what it is worth. It is in favor of no man's coupler and in favor of no line. We want to get this question solved. Railroad men can not solve it. You can not get a railroad man to tell you that he wants the Congress of the United States to pass a law to solve it. The railroads can not solve it. As Mr. Baldwin says, the large moneyed interest which certain railroad men have in particular types of couplers will prejudice the selection of a coupler when voted upon by the various railroads in interest, and that the result aimed at, the safest appliance for protecting the lives of railroad employees, may not be reached on that account. That is the milk in the cocoanut of this whole matter.

My bill is numbered 6187. I had Major Pickler, of South Dakota, introduce it. It is just exactly like Senator Cullom's bill in all of its

details except the first three sections. It provides for a commission of seven, and the Congress of the United States can well afford to be lavish in an appropriation of money for taking up this matter and disposing of it and getting some head to it, and the only way I can see is for some disinterested, high-minded commission to have the authority to act and who will report their findings to Congress, if it is not settled by the approval of the Interstate Commerce Commission.

Senator BARBOUR. I understand the gentleman to say that the railroad managers are interested in couplers?

Mr. KING. Yes.

Senator BARBOUR. I think a sweeping charge of that sort ought to be more specific. So far as the Southern railroad managers are concerned I am satisfied it is not so.

Mr. KING. The Senator was not present, I think, when I made the proper preface to that.

Senator BARBOUR. I do not believe that the Baltimore and Ohio people are connected with any coupler.

Mr. KING. I only get this from the testimony of railroad men. They tell me that railroad managers are interested in particular couplers.

Senator HARRIS. You mean in patents?

Mr. KING. Yes.

Senator HARRIS. I understood your allusion to be that the railroads had money already invested in particular couplers which were on their cars.

Mr. KING. That is the main thing. A line has adopted a particular coupler and they have got their money invested in that particular coupler, and, of course, they do not want to throw their money away.

Senator BARBOUR. I do not see how any railroad managers could properly be interested in any patent or any device they may be using on their lines.

Mr. KING. The only reason I have for thinking so is the testimony of railroad men.

Senator BARBOUR. I know the Janney coupler, one of the leading ones, is owned by outside parties, and they had hard work to get it introduced.

The CHAIRMAN. What is your business now?

Mr. KING. I have been a railroad commissioner of South Dakota for a number of years, and occupied that position when I was placed upon this committee by the railway commissioners' convention. I have been associated with Mr. Crocker, of Massachusetts, in connection with the investigation of this question. I have no interest in any corporation, person, or thing in any way, directly or indirectly. I am a lawyer by profession. I am, at present, in the Treasury Department of the United States.

Senator WOLCOTT. As a clerk?

Mr. KING. As chief of division.

Mr. COFFIN. How long were you a commissioner?

Mr. KING. Three years. I asked to be relieved from service on this committee, but Mr. Crocker insisted that I should remain. I resigned my position as a railroad commissioner.

STATEMENT OF L. S. COFFIN.

Mr. COFFIN. Mr. Chairman and gentlemen of the committee, I stand before you feeling a good deal embarrassed and still a great responsibility, as the letter that I handed the chairman informs him of the position I occupy.

The CHAIRMAN. I will read a part of the letter to which Mr. Coffin refers:

> I have to-day caused to be forwarded to Hon. L. S. Coffin, of Iowa, who is representing our organization at Washington, a supply of annual reports and other printed matter, with the request that the same be distributed among the members of your committee.

That is from Mr. W. A. Sheahan, grand secretary and treasurer of the Brotherhood of Railroad Trainmen. I read this clause of the letter to show Mr. Coffin's relation to the subject.

Mr. COFFIN. Mr. Chairman, I do not stand here to urge you to do your duty. You are just as ready to do your duty as I or anybody else. What you want of me is all the information you can get out of me, and I stand here to give you everything that I possibly can that will help you in this matter. I have had some opportunities to gain information in this matter, and I will just say that I was for five years one of the railroad commissioners of Iowa. I became early interested in the matter of safety to these men, and I put myself in the way to find out everything that possibly could be found out in regard to the matter. I have been present at every brake test made in America since 1883 and at nearly every coupler test that has been made.

I want to lay some facts before you that have not been placed before you at all, and it is surprising that some of the railroad companies have not laid these facts before you. In the first place, let me say there is a demand for this legislation. I took up the World, printed in New York, yesterday, and I found there an editorial in regard to a coupler job before Congress, and saying that the attempt to get legislation was a coupler job to enrich a lot of coupler folks. Let me just show the perfect lack of foundation for anything of the kind. There are in this nation now twenty-eight States that have the system of railroad commissions. Those States unanimously, in the conference of the railroad commissioners, asked Congress to act on the matter. Besides these, some of the States that have not the railroad-commission law have voluntarily passed resolutions, sending them to Congress, asking Congress to act. Here is a large majority of all the States, and they have asked Congress to enact legislation on this matter. There can not be any job about that. You can not think of that thing.

Here is another point. There is at this time, and it is a most opportune thing, too, an inevitable necessity before the railroads of the United States. What is it? It is that there has got to be a change in all their drawbars, aside from the question before us. They have got to do that. Why? You and I all know that the freight car of to-day is of about three times the capacity as compared with what it was ten years ago, when it was 10 tons; now it is 30. We all know, too, that the weight of an engine is something like two or three times what it was ten years ago. Hence the strength of the connecting device between the trains must be increased, and the everlasting breaking of

the link and pin is causing wrecks and loss of life. You say, can they not increase the strength and size of the links? No, they can not do it. Suppose the Baltimore and Ohio should go to work and say they will do that. In order to make their pins larger they have to have a drawbar with a larger hole. They have got to have a drawbar with a larger mouth for the link to enter, and all other roads have to do that or else the cars are not interchangeable. They have a standard link and pin all over this nation, and you go on any freight train you please and go into the caboose and you will find there hundreds of pounds of links and pins to meet emergencies. They are all exactly alike; they are standard; they are not strong enough to meet the exigency of the service at this time. Hence there is going to be, there must be inevitably, an entire change of drawbar on all the freight cars in this nation. Every railroad man will say that I am right in regard to that. Trains breaking in two is very expensive and very dangerous.

Allow me to point to a very recent object lesson. The public are not aware of it. The whole country was shocked at the terrible accident on the New York Central Christmas eve. The public have no idea of what was the original point to that accident where so many lives were lost. I will tell you. A freight train was on that track, and in starting up to get away from the coming passenger train it broke in two, because of a link-and-pin coupler. That delayed the first passenger train, into which the second passenger train ran with such terrible results. The breaking of the freight train in the first instance, you will see, caused the wreck. I went to Mr. Toucey. I came on to New York to find out what kind of coupler was used. I asked him. He said, "I had not thought of that; it is a very important point." He called a man in, one of the superintendents, and asked him. He did not know. He ordered him to get the information, so that when I called the next morning I could have it.

Let me say right here, while I am speaking of Mr. Toucey, that he said to me, as I left his office:

Mr. Coffin, if you can get legislation through Congress on this matter, do not make it over five years for all the cars to be equipped with safety couplers in this nation. We can do it in that time. We want to do it and we want to have it done.

The CHAIRMAN. What is his relation to the New York Central Railroad?

Mr. COFFIN. He is general manager of the New York Central. The railroads themselves have been making great effort to meet this difficulty and this demand.

I am surprised, Mr. Chairman and gentlemen of the committee, at the statements made here by the gentleman who preceded me. I want in order to throw some light upon the question that he has brought up and the assertions he has made, to have you go with me briefly and slowly up to the point we are now, of the efforts of the railroads themselves to get a uniform standard coupler. Mr. King said that you can not get the railroads to agree. I have the reports here of the Master Car Builders' Association from 1887 up to their last convention, that of 1891, held at Cape May in June last. I want to say that each member of that association has his name here [indicating in book], the road he represents, the number of cars he represents, and from this statement [indicating] it will be seen that the

number of cars represented in that association at their last meeting was 991,564—practically a million cars. You all know that that about takes in all the cars there are in this nation. You take the reports and go clear back. Here is the report of 1887, when the Master Car Builders' National Association met at Minneapolis, Minn. There they adopted the report of a committee on safety appliances and especially on couplers.

The CHAIRMAN. How is this association composed?

Mr. COFFIN. It is composed of such men as Mr. Ely, who was before you. Then there is the Master Mechanics' Association and the Master Car Builders' Association, and very often the master mechanic is a member of the car-builders' association and vice versa, It is made up of these master car-builders and master mechanics.

The CHAIRMAN. Of all the roads?

Mr. COFFIN. Of all the roads. There is never less than 90 per cent represented. They are sent there by the railroad managers. It is an absolute necessity to have that association. They meet together to decide upon standards of everything connected with the making of an engine or the making of a car.

Senator WOLCOTT. Does it include car builders who are not officials of railroads?

Mr. COFFIN. It takes in some, but only those representing cars have a right to vote.

I say it was an absolute necessity to have that association, when these little roads, all over the nation, some twenty or thirty years ago, began to combine to make through lines so that cars went all over. Then it was found to be absolutely necessary to have the men who had charge of the repairing of the cars make arrangements for the repairing of the cars, as they would be all over the nation, so that if a car belonging in Portland, Me., is found in Portland, Oreg., with a broken axletree it is taken in the shop there and they have an axletree just exactly like it. It is a standard. They have decided upon it, and that axletree can be put into the wheels and the car sent home. You see at once how it works.

These master car builders (I wish you had time to examine the plates showing the exact size and dimensions) are carefully doing this. If you could look at the plates you would see how careful they are and how important it is that they should be so. The railroads send these men there; they pay their expenses; they take them two weeks away from their work and send them to this convention for the very purpose. At the Minneapolis convention five years ago, after years of experimenting and tests, and I attended some of these tests of couplers, a report was made and the association adopted that report by a two-thirds vote, and that has to be so. After that, as I said before you two years ago, that does not fix it. The action of the master car builders has to be sent to all the managements of the roads represented in that association, and if, after ninety days of consideration, they, by a letter ballot, approve of the action of the master car builders in that particular thing by a two-thirds vote that particular thing becomes a standard for all the roads of the nation.

Now, that took place in the fall of that year. The letter ballots were returned to the secretary of that association, and there were fourteen more than a two-thirds vote.

Senator GORMAN. You mean to say that they agreed upon a particular coupler?

Mr. COFFIN. A certain type; no one particular coupler. That type was named the Janney type. After the return of the letter ballots, so that the master car builders knew what to do, by order of their managements the executive committee was instructed to get a coupler of this kind, look it over, test it, and examine it, and change its lines, if it need be, and then publish to the world the contour lines and the size and shape of that coupler as the standard coupler of the railroads of this nation.

They did that. They found in their investigations that there were certain patents upon the contour lines of the coupler that they had chosen, and they could not go any further unless the patentees would surrender those claims to the association, which was done, and they were surrendered to the railroads of this nation.

Mr. KING. You are in favor of legislation specifying the Master Car Builders' type.

Mr. COFFIN. I favor legislation that shall put into use what the great majority of the railroads have adopted.

Mr. KING. That, you say, is the Master Car Builders' type?

The CHAIRMAN. Mr. Coffin had better be allowed to conclude his statement.

Mr. COFFIN. I want to explain to you—I must go right to that point—the wonderful anomaly that has come up before you, what Mr. King has said, that the Master Car Builders' couplers will not couple with each other, and that the railroad boys do not want them; that they would rather have the link and pin. That is all very natural, as you will see it. I want to say, before I come to that, in all these reports of the Master Car Builders' Association and conventions there is not a single attempt to do away with that standard, but to make it still stronger and stronger every time.

Now, as to the adoption of this standard—remember, it is a type, not a particular coupler—the makers in making these couplers, some of them, having ideas of their own, changed the patterns a little, and the patterns would become a little changed in molding, and by and by it was found that sometimes two of these same couplers would not couple together.

The CHAIRMAN. With each other?

Mr. COFFIN. Yes, sir; with each other. That came up for discussion in their convention, and in 1890 a committee was appointed whose business it was to examine into this matter. One of the committee lived at Buffalo. This committee was authorized to send out to every manufacturer of Master Car-Builders' couplers and have him send a coupler and a drawing of his coupler to the chairman of this committee in Buffalo, and then the committee would examine all of them. Here is the drawing of the Master Car-Builders' coupler [exhibiting]. They would apply these specifications to all these couplers and see how much they differed and see where the difference was. There were 18 couplers sent to them. Let me set you right in regard to the wonderfully wild assertions that have been made before the committee that there are several hundred of the master car-builders' couplers all alike. There were but 18 manufacturers of the couplers of the Master Car-Builders' type who had couplers they could send there. There were 6 or 7 others who sent specifications and drawings

of a coupler they had in embryo. This committee applied the test. It would be interesting to see how they varied from the standard contour lines, if the committee had time to go into the matter.

This committee reported to the convention of 1891 at Cape May the variations there were and showing why the couplers would not couple. The committee was then instructed to get templates and gauges and furnish them to every manufacturer of the Master Car-Builders' type of coupler and to the railroads, so that they could apply them to every coupler that came to them for sale. A firm in Connecticut, some of you may be acquainted with it, the Pratt & Whitney Company of Hartford, who are manufacturers of very fine work, were employed to make these templates, the gauge to be made of the hardest kind of tool steel. The manufacturers of this type of coupler were furnished with these gauges and the railroads were also, so that now there may be twenty or thirty of the Master Car-Builders' couplers manufactured, and every one of them, in the hooking point, is exactly alike, and every one will couple under every conceivable circumstance in railroad service. I was surprised to hear some of the statements. They were made because the gentlemen do not know these things. Here [exhibiting] is the circular sent out by the committee giving the form of gauges and showing where they can get them. That was sent to every master car builder.

Senator WOLCOTT. Let me ask you a question. If it is a fact that the Master Car Builders' type has been adopted by the railroads, and that they are finally getting to work on the proper basis, what is the need of legislation?

Mr. COFFIN. I will come to that.

Senator WOLCOTT. Let us get to that. That, I suppose, is what we want to hear.

Mr. COFFIN. I do not want to omit anything that you may want to have before you.

If you will allow me to delay answering that a little I want to refer to the wonderful pains that they have taken to arrive at this thing properly. In 1885 they advertised to the world that their committee would be at Buffalo to test couplers, and asked all parties who had a coupler that they thought would meet the emergency to come there with two cars equipped with them. I was there, and for two days the experts handled the cars. There were some fifty-odd couplers. A great many more sent models that they would not examine. Then, after the two days of tests, the committee retired to a room and invited some of us to come in and hear the discussion on the tests. The fifty couplers were cut down to twelve. Those twelve were recommended to be continued for trial, this road agreeing to take fifty couplers and put them on their cars and use them and keep an accurate account of their service and how they worked, and another company agreeing to take fifty of another style.

Then, at their next convention, these were reported upon, and they were cut down still more. At their next convention at Minneapolis, in 1887, they were all cut down to one type of coupler; not one coupler, but one type.

I dwell on this matter for the purpose of showing to you that if you create a commission it has got a long job before it. These men, with all the facilities that they had, and which no commission can have, have been for years arriving at what they have now come to,

and have got a practical thing, so they think—and who has a better right to think that they have than they themselves?—and they are sustained by their roads.

Senator HARRIS. Without going into the details as to how the railroads have arrived at the conclusion, is it a fact that the great majority of the railroad companies of this country have agreed upon a type of coupler?

The CHAIRMAN. A specific device.

Mr. COFFIN. Yes, sir; a type.

Senator HARRIS. Is it a fact that each specific device belonging to that type will couple and uncouple with another of the same type?

Mr. COFFIN. Yes, sir.

Senator HARRIS. Is it a fact that the great majority of the railroad companies recommend the adoption of that type of coupler?

Mr. COFFIN. Yes, sir.

Senator HARRIS. Is it a fact that the roads are proceeding with reasonable expedition to adopt the coupler of that type?

Mr. COFFIN. The majority of the roads are; not a very large majority, but a majority.

Senator HARRIS. I would be glad to know, then, if there is any necessity for legislation on this subject, and why?

Mr. COFFIN. There are certain roads, as Mr. King said, that will not do this thing unless they are compelled to by law. Take the Gould roads. They will not do a thing until the law compels them to do so.

The CHAIRMAN. What proportion are the Gould roads to the entire mileage of the country?

Mr. COFFIN. They are a small minority.

The CHAIRMAN. Are there any others who would refuse to put on the couplers until compelled to do so by legislation?

Mr. COFFIN. There may be some few. I want to explain to you about the Sault Ste. Marie road. That road has an immense amount of Canadian traffic. It has to take the Canadian cars, which are equipped with the old link-and-pin couplers. Now you see why they do not adopt the Master Car Builders' coupler.

Senator GORMAN. Does a patent cover any portion of the Master Car Builders' coupler?

Mr. COFFIN. Yes, sir; some portion of it. It is now so common, however, that it is just a matter of manufacture and sale, as with any other thing. As Mr. Ely said the other day, it is just like the manufacture of a hoe; the patents do not cut any figure in it whatever.

There are some roads that will not do anything. Pardon me if I say this, but roads that are more for Wall street than for actual work among the nation will not do anything?

Senator WOLCOTT. What do you mean by that?

Mr. COFFIN. Roads for speculation.

Senator WOLCOTT. Are not all railroads carriers?

Mr. COFFIN. Yes, sir.

Senator WOLCOTT. What do you mean by railroads being for Wall street and not for the people? I wish you would designate them.

Mr. COFFIN. I suppose it is a matter of common intelligence.

Senator WOLCOTT. I have not enough common intelligence to know what railroads are for Wall street and what railroads are carriers for the people.

Mr. COFFIN. Probably it would not be best for me to specify them. We have those things in our minds, I think. Mr. King has spoken of the interest managers have in these couplers.

The CHAIRMAN. You have not quite answered the question of Senator Wolcott or of Senator Harris on the question of the necessity for legislation.

Senator HARRIS. Is legislation necessary; and if so, exactly what legislation?

Senator WOLCOTT. Why?

Senator HARRIS. And why?

Mr. COFFIN. To my mind legislation certainly is absolutely necessary to reenforce (perhaps that is the word I want to use) the majority of the roads that are trying to get a uniform coupler all over this nation for the safety of their men. That is what we want. There are some roads that will not do anything, that are not doing anything. We know that a great majority of the roads are doing something. Mr. Haines said right here that his association, representing 122,000 out of 170,000 miles of road, have adopted it as a settled policy to put the Master Car Builders' type of coupler on every new car and every repaired car, and on all others as fast as they can. Here is a large majority of the roads doing this very thing. But the others can not. They do not. I can not tell why.

The CHAIRMAN. What progress is made from year to year?

Mr. COFFIN. During the last year there has been a wonderful progress, as Mr. Haines showed you by the diagram. It runs up very rapidly. There has been in the last year a larger number adopted than in any two or three years before.

Senator JONES. During the last year have any roads which have not heretofore used that coupler adopted the Master Car Builders' type?

Mr. COFFIN. I am not prepared to name the particular roads, but I have been told that there are some who have.

Senator JONES. Then is it likely that in the coming year there will be other roads who have not done it heretofore who will adopt these couplers?

Mr. COFFIN. I have no doubt of it.

Senator WOLCOTT. Do you appear on behalf of the majority of the railroad companies asking that the minority be coerced into doing this? Do you understand that the railroads representing a majority of the total mileage of the country are in favor of some legislation that will compel the minority to do what they, the majority, are already doing?

Mr. COFFIN. I am not here in the interest of the railroads *per se* at all. I am here in the interest of the employees.

Senator WOLCOTT. Do you understand that the majority of the railroads desire the minority to be coerced into doing this?

Mr. COFFIN. They do not want any compulsory legislation.

Senator WOLCOTT. The majority do not need it because they are already putting on the couplers.

Mr. COFFIN. Yes, sir. If we had all such roads we would not want any legislation. Mr. Haines thinks that the moral effect on the other roads will bring them into line. It has not brought them in yet. He says that by refusing to take cars that are not equipped with auto-

matic couplers they will be compelled to come in. In your investigation only a few years ago you did not find a single instance where the general managers kept their agreements in regard to pools. Now, suppose you take the Standard Oil Company, which has not a single automatic coupler on any of its tank cars. Suppose the Standard Oil Company says to the Baltimore and Ohio, or the Pennsylvania, "You must take our cars or we will go to the Michigan Central." There has got to be a good deal of backbone on the part of the managers to refuse to take that traffic. It can not be done. Competition will upset any of these agreements, and it is only by the stern say-so of the law that these men will ever be brought into line. Mr. Rockefeller is a grand man, yet I do not see any sign of his equipping his cars with automatic couplers.

I am not talking at random. Two years ago I prepared a bill and presented it and secured legislation in Iowa. It was passed in the senate without a single dissenting vote. In the house there were two or three. I have a letter from Mr. Ives, president and general manager of the Cedar Rapids and Northern Railroad, having some thousand miles, in which he says that they are equipping their cars according to law, and at the end of his letter he says:

I do hope, Mr. Coffin, as we have started in on this line, that you can get national legislation to bring all the roads into line.

That is his letter. I have it here now.

The CHAIRMAN. What kind of a coupler does he put on his cars?

Mr. COFFIN. The Master Car Builders' type. He has two or three different kinds, and he says he sees no trouble at all, that they operate nicely.

Now, again, let me tell you what Mr. Whitman, the general manager of the Chicago and Northwestern, said to me the other day as I came through Chicago. I think he said that on the Lake Superior line, which was equipped with that kind of coupler, "We run solid trains equipped with Master Car Builders' type of coupler and absolutely"—he brought his fist down on the table—"and absolutely there are no breakages at all, and no injuries at all where they run solid together."

Senator GORMAN. If that is so, is it not sufficient inducement for the other railroad companies to adopt it?

Mr. COFFIN. I should think so. Let me explain one thing right here, Mr. Senator. The managers may be all right, the superintendents may be all right, and probably they would like to equip their cars with these safety appliances, but the owners of these roads have to vote, through their directors, and the ownership probably is absenteeism, across the water, where you can not reach them all the time. The managers may go to these boards in vain, and unless there is a law they can not get the appropriations to put on the appliances. That is one of the necessities for the law. If it were all home work there would be no trouble, I think.

Senator GORMAN. Is not the whole thing an experiment up to the present time?

Mr. COFFIN. It is now beyond the experimental stage.

The CHAIRMAN. As to the proper coupler?

Senator GORMAN. As to the proper coupler. Here is the Baltimore and Ohio with a dozen different couplers. It insures all of its

employees. It is a home road. It is owned by the people right around there——

Senator BARBOUR. Do they not get the insurance fund out of the employees?

Mr. COFFIN. The Baltimore and Ohio is equipping every new car with this same type of coupler just as fast as they can, and every repaired car is being equipped with them. Mr. Geives, I think that is his name, is the master car builder, and he has been on this committee to urge the Master Car Builders' Association to adopt this coupler. I am very well acquainted with him.

Senator GORMAN. All the new cars are to be equipped with these couplers?

Mr. COFFIN. The new cars and the old cars, as fast as they can get the means to do it. It makes no difference whether it is the Hinson or the Gould or the Janney.

Now, let me give you another instance. On the Chicago, Burlington and Quincy road in 1887 there was a gravel train equipped with some twenty or more cars of the Master Car Builders' couplers, and eight or ten with the old Porter drawbar, the strongest link-and-pin coupler there is. That gravel train has made a mileage of over four times round the world, and there has not been a single breakage in the Master Car Builders' coupler.

I bring this up to show to you gentlemen that you can not make a mistake in legislating in the direction in which the great majority of the railroads have gone and gone so carefully.

The CHAIRMAN. What kind of legislation do you want?

Mr. COFFIN. If you will pardon the egotism that Mr. King referred to, I will read to you one or two sections of a bill that I have prepared and had introduced in the House. It would have been introduced in the Senate, but Senator Allison introduced the bill which was introduced at the last session instead of this one, which I submit to the committee with the amendments I wish made in it.

The bill is as follows:

A BILL providing for a uniform system of coupling cars and controlling railroad trains, for the greater safety of railway employees.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the passage of this act it shall be unlawful for any person, company, or corporation operating a railroad in this nation to put into use any new locomotive for the purposes of interstate commerce that is not equipped with a proper power brake.

SEC. 2. That on and after twenty-four months from the passage of this act it shall be unlawful for any person, company, or corporation engaged in the movement of cars on any railroad to facilitate interstate commerce to use any locomotive engine to move such cars that is not equipped with a suitable power brake, or with what is commonly known as a "driver brake."

SEC. 3. That no person, company, or corporation can lawfully, after the passage of this act, put any new car, or car that has been to the shops for general repairs, or which has to have one or both of its drawbars replaced by another, into use on any railroad for the movement of interstate commerce which is not equipped with suitable safety couplers.

SEC. 4. That it shall be unlawful for any person, company, or corporation in the United States which may be engaged in interstate commerce to use any car in the movement of such commerce after January, eighteen hundred and ninety-seven, that is not equipped with proper safety couplers.

SEC. 5. That it shall be unlawful for any person, company, or corporation that is now or may hereafter be engaged in the movement of interstate commerce to run any train of cars in such work after January first, eighteen hundred and

ninety-five, that has not a sufficient number of cars in such a train so equipped with power or train brakes that the engineer on the locomotive drawing such train can control the speed of the train without requiring brakemen to use the common hand brake for that purpose.

SEC. 6. That the main design of this law being this, namely, greater safety to employees in handling cars and running trains which may be engaged in moving interstate commerce, it requires all persons, companies, or corporations owning or using such cars and trains to adopt a uniform system of coupling and uncoupling such cars, and it enforces upon all such parties engaged in interstate commerce the universal use on all their cars of the standard type of safety couplers as established by the majority of such persons, companies, and corporations, through the American Railway Association, the National Railway Master Car-Builders' Association, the Railway Master Mechanics' Association, or any other representative association of railway officials representing the majority of the mileage and a majority of the freight cars of the railroads of this nation, as shown by the published reports and records of the regular conventions of any one or all of these associations, now extant or that may hereafter be published by them. And the so-called safety couplers mentioned in this act must be uniform in their action so as to be interchangeable upon all the cars on any railroad engaged in the interstate commerce, and they must be such as will not require the men to stand between the ends of the cars when the act of coupling is done, or require them to go between the cars to uncouple them when in a normal condition. And the intent, meaning, and design of section five of this act is to require that all freight trains engaged in interstate commerce shall be so equipped with power or train brakes which can be manipulated by the engineer drawing such train so that he can control such train with the same safety to the freight-train men as passenger trains are now controlled by the engineer drawing them with safety to passenger-train men, as far as the manipulation of brakes is concerned.

SEC. 7. That when any person, company, or corporation engaged in the movement of interstate commerce by railroad shall have equipped 50 per cent of its cars with said couplers, a sufficient number of cars with power brakes so as to meet the requirements of this law, it may lawfully refuse to receive from connecting lines of roads any cars that are not equipped with such safety couplers and power or train brakes as will work and readily intercouple with the couplers and brakes in use on its own cars, as required by the provisions of this act.

SEC. 8. That any person, company, or corporation engaged in interstate commerce using any locomotive, car, or trains contrary to the provisions of this act shall be held prima facie guilty of gross carelessness, and shall be absolutely liable for all injuries to their employees or other persons that may result from handling or working with such locomotive, car, or train, being in use contrary to the provisions of this act.

SEC. 9. That any employee of any person, company, or corporation engaged in interstate commerce who may be injured by any locomotive, car, or train in use contrary to the provisions of this act shall not be deemed guilty of contributory negligence although continuing in the employ of such person, company, or corporation after the habitual unlawful use of such a locomotive, car, or train had been brought to his knowledge.

SEC. 10. That any person, company, or corporation using any locomotive, car, or train in interstate commerce contrary to the provisions of this act shall be deemed guilty of misdemeanor and liable to a fine of five hundred dollars for each and every offense, collectible in any district of a United States court where the offense may have been committed.

SEC. 11. That every person, company, and corporation engaged in interstate commerce by railroad shall include in their annual report to the Interstate Commerce Commissioners the number of freight cars owned and controlled or leased by them, the number equipped with safety couplers, and the name and make of the couplers used, the number of freight cars equipped with power or train brakes and the name and make of such brake, and also the number of locomotives owned and used and the number equipped with driver brakes. And the said Interstate Commerce Commission is hereby authorized, if found necessary after a full investigation, to extend the time for the full equipment of the rolling stock of any road affected by the provisions of this bill to such a date as it may in its judgment deem the exigencies of the circumstances and condition of the road in question may require, due regard to the rights and safety of employees always being had.

Mr. COFFIN. Now, all I ask is legislation that will help on and reenforce the roads in their selection of a coupler that is practical and is doing the work, and is being put on already very rapidly. The coupler that the Master Car Builders have adopted will be so perfected in its details that there will not be a single one of that type that will not couple and uncouple always under all circumstances.

Senator WOLCOTT. Some of the roads, in good faith, are, as rapidly as their business and finances will permit, changing to a standard coupler. Now, do you understand that they want the other roads coerced? These roads, as far as I am informed, are not here demanding legislation. How do you account for it, if the majority are going ahead and doing the best they can? You cited the Baltimore and Ohio and the Chicago, Burlington and Quincy——

Mr. COFFIN. In my private conversation with Mr. Haines, the president of the American Railway Association and also vice-president of the Plant System in the South——

Senator WOLCOTT. Is that a Wall-street concern?

Mr. COFFIN. I do not know.

Senator BARBOUR. I guess they are all in Wall street.

Mr. COFFIN. He said, "We do not want to be placed in a position of asking Congress to pass compulsory legislation." You know and we all know that they resist all kinds of legislation in regard to their own matters, but if you take up the testimony and talk of Colonel Haines before the committee it seems to me that you can read between the lines all along that he is almost asking you to help him by passing such a law.

Senator HARRIS. In view of the fact that the common carrier is required at common law to use the best safety appliances, failing to do which he is guilty of negligence, which would make him liable for all damages that occurred by reason of that failure, is it not probable that every carrier will have the best safety appliances as fast as he reasonably can?

Mr. COFFIN. It would seem so.

Senator HARRIS. Are they not doing so?

Mr. COFFIN. As a matter of fact, they are not doing so.

Senator HARRIS. Is it not a fact that they have, within the last year, adopted a vastly larger proportion than ever before; is it not a fact that they are now, up to the last date you have information, adopting them with the rapidity that characterized the proceedings of last year?

Mr. COFFIN. Let me answer that in this way: Our legislature two years ago passed a law that all roads running through Iowa must put on these couplers. Nebraska copied our law and passed it last year. New York has a law similar to that. These laws are having the effect of driving the roads to put on these appliances. This legislation will go on if Congress does not act. The States will act, and the danger is that we shall get a conflict and a multiplicity and have the same trouble we are having now. Congress is the only power that can act.

Senator JONES. In addition to what you say about the States, I understood you to say that an association representing 122,000 out of 170,000 miles of railroad have agreed to adopt this type of coupler, and are already putting them on?

Mr. COFFIN. That is what Mr. Haines stated before the committee.

Senator JONES. And you say that railroads began to use that coupler last year who had not used it before?

Mr. COFFIN. Yes, sir.

Senator JONES. And you also stated that other roads, you think, will do the same thing in the future?

Mr. COFFIN. Yes, sir.

Senator JONES. And continue the thing that way?

Mr. COFFIN. Yes, sir. It delays the thing. Too much stress can not be put on the necessity of having this transition period as short as possible. The secretary of the Trainmen's Association sent to the chairman the report for the last year, and I wish you would just look at that and see line after line where it says "Killed coupling cars," "Killed coupling cars," and you look further and see where the $1,000 for total disability went. You will find that the majority are young, unmarried men.

The CHAIRMAN. Who pays this money?

Mr. COFFIN. The boys themselves.

Senator HIGGINS. It is an insurance fund?

Mr. COFFIN. Yes, sir; they do it among themselves.

The CHAIRMAN. It does not come out of the corporation?

Mr. COFFIN. No, sir.

Senator WOLCOTT. You know it is a fact that some of the railroads contribute their share?

Mr. COFFIN. Yes, sir. The Chicago, Burlington and Quincy and the Baltimore and Ohio have insurance companies.

Senator HIGGINS. The Pennsylvania and the Baltimore and Ohio railroads require their employees to pay into the treasury a certain proportion of their salary?

Mr. COFFIN. Yes, sir.

Senator GORMAN. The company furnishes part of it.

Mr. COFFIN. Yes, sir; but the most of it comes from the boys themselves. There is no question if we can get legislation requiring all the roads to adopt a uniform coupler nine-tenths of this will be done away with.

Senator HIGGINS. Is it not true that the Baltimore and Ohio or the Pennsylvania in exacting of their employees membership in these associations also requires them to sign a contract that they will not sue the company for damages?

Mr. COFFIN. Yes, sir; that is the fact.

Senator WOLCOTT. Do you not know that that has been declared unconstitutional in most of the States?

Mr. COFFIN. Mr. Chairman, I would like to take up a few moments of your time in a discussion of the air-brake question.

The CHAIRMAN. Mr. Stahlman is here and is anxious to leave the city, and we will hear him now.

STATEMENT OF E. B. STAHLMAN.

The CHAIRMAN. Please state your relation to the railroads.

Mr. STAHLMAN. I am a commissioner of the Southern Railway and Steamship Association. Headquarters in Atlanta, Ga. My home is in Nashville.

Mr. Chairman and gentlemen of the committee, I shall be very brief in what I have to say. I have read the arguments presented on

this question, as far as I have been able, since I was before the committee on Wednesday last, and there is one thing which has impressed itself upon my mind, and has doubtless found a lodgment in your minds, and that is that of all who have appeared before you desiring legislation scarcely any two agree.

The CHAIRMAN. As to the specific kind of legislation desired?

Mr. STAHLMAN. Yes, sir; as to the specific legislation.

The CHAIRMAN. All of them agree that something ought to be done?

Mr. STAHLMAN. Yes; all of them agree that something ought to be done. None of the gentlemen, however, who have appeared before you, who, from their own statements, have given the matter much thought and serious consideration, have agreed or do agree as to what ought to be done. About the only practical thing suggested by any man or body of men, as far as I can see, has been by the Association of Master Car Builders. They agreed among themselves several years ago that something ought to be done, and they took steps to do it. They designated a certain type of coupler. The roads in the main agreed to adopt that style of coupler. That type of coupler is being put on the cars of the different railroads in this country about as fast as anyone, under the circumstances, could expect it to be done.

In the first instance it may be assumed that when the Master Car Builders' Association first recommended a particular type of coupler there was still some doubt in the minds of this body of mechanics as to the utility of that coupler, and hence for the first year or two the process of putting on the coupler was very slow. We find upon investigation that during the first year after the adoption of that coupler there were but a few put on. The test having been made that year to the satisfaction of a number of the railroads, more were put on the next year. The test having been more satisfactory to a larger number of roads, a larger number were put on the next year, so that now we have reached the point where we are pretty well satisfied that the type of coupler recommended will answer, and it is reasonable to assume, in view of what has been done, that much better results will follow and much more will be done hereafter.

The appointment of a commission to determine what ought to be done has been suggested. Suppose you appoint a commission? It will require a year or two at least for a commission under the plans proposed by some of these gentlemen to reach a conclusion as to what ought to be done. It will then require perhaps six months or a year for the Interstate Commerce Commission to determine whether or not that is the best thing to be done, and then if the Interstate Commission should conclude that it is not the best thing to be done it is to come back to Congress to settle in some other way, and all this time the work now going on, of putting on the Master Car Builders' type of coupler, which seems to answer every purpose, will be stopped.

The CHAIRMAN. I should think you would have them all on by this time?

Mr. STAHLMAN. The chances are, if let alone, that the entire work will be finished before that time.

Mr. Coffin, who seems to be an advocate of the Master Car Builders' type of coupler, insists that Congress shall fix a time in which to conclude this work. That suggestion upon its face does not seem unreasonable, yet in doing this Congress may go a long way toward assum-

ing a responsibility for the Government which ought not to be assumed. Suppose Congress should say to the railroads that the work of putting on this type of coupler shall be completed within two, three, or five years, and the railroads, in accordance with the requirements, go forward, and after the work has been completed injury to life and limb continues, will not the railway companies be relieved of liability? Can Congress say to the railroads of the country you must do thus and so, and if done still make them liable for the injury inflicted by a compliance with the requirements? It seems to me we are treading on dangerous ground. At common law and under the several State statutes railway companies are required to adopt the best and safest appliances in conducting their business. Is it wise to relieve them, even by implication, of this responsibility?

I think I can plainly see why the makers or patentees of couplers of the Master Car Builders' type prefer to have Congress compel the railroads to adopt and complete the work of putting on that type of coupler within a few years. They know if Congress can be induced to take this step all other forms of couplers, even though an improvement on the Master Car Builders' type should be discovered, will be shut out.

Speaking for the section I represent, I think the reports of disaster to trainmen have been very greatly exaggerated. I speak now of the railroads south of the Potomac and Ohio and east of the lower Mississippi rivers.

Senator GORMAN. What is the mileage?

Mr. STAHLMAN. About 25,000 miles, according to the report I have in my hand. The roads that I represent are embraced in groups 4 and 5.

It is safe to assume that the railroads of the country do not want to kill people. They want to preserve life, and they are especially desirous of preserving the lives of those employed by them. If they can minimize the risk of operating their railroads they can reduce the expenses of operation. The brakeman who brakes upon the train, now receiving from $2 to $2.50 per day, would, if engaged upon a farm, receive less than $1 per day. It is the risk largely which calls for the increased rate of wages. We have men working on the tracks for $1 per day, and men in other branches of the service where there is practically no risk assumed who receive only $1, who work just as hard and just as diligently as brakemen on the trains. They are not paid so well for the reason that the risk is not so great.

One would suppose from what has been said on the subject that the railroads were murdering people at a terrible rate. I have looked into this subject, and it is not near so great as you may have been led to believe. On the 25,000 miles of road in my section 39 were killed.

Senator GORMAN. In what time?

The CHAIRMAN. During what period?

Mr. STAHLMAN. During the entire year.

Senator CHANDLER. By coupling?

Mr. STAHLMAN. Yes, sir.

Senator GORMAN. What are you reading from?

Mr. STAHLMAN. From the last report of the Interstate Commerce Commission.

Senator HIGGINS. That is equivalent to the loss of life in a pretty sharp battle?

Mr. STAHLMAN. Yes, a skirmish. But if we will take the statistics of death to men who ride in vehicles and on horseback we will find it infinitely greater.

The duty, as the railroads of my section have seen it for the last eight or ten years, and the duty they are discharging faithfully, is to do all in their power to protect the lives of the traveling public.

Senator HIGGINS. Have the railroads you represent put on these appliances in as large a ratio as those of other sections?

Mr. STAHLMAN. I think not, as the reasons are that the earning capacity of the roads of my section is small as compared with other sections. The earnings are about $4,300 per mile.

The CHAIRMAN. Per annum?

Mr. STAHLMAN. Yes, sir. The roads embraced in group No. 3 earn $7,785 per mile.

Senator GORMAN. What section of the country is that?

Mr. STAHLMAN. The western section, east of the Lake region. The roads in group No. 1 earn $10,441 per mile, and in group No. 2 $15,829 per mile, so that our roads earn a little more that half of those in group 3, less than half of those in group 1, and less than one-third of those in group 2.

Senator HIGGINS. Is it your argument that the lack of earning capacity justifies you in killing and maiming people?

Mr. STAHLMAN. Not at all. My argument, Mr. Chairman, is that the first duty we owe is to the general public as common carriers. We must put and keep our road in safe condition, and in order to do this we must take down our wooden bridges and put up iron bridges; we must take down our wooden trestles and put up iron trestles; we must arch our tunnels, we must put down better and heavier rails; we must put on better cars; we must put on better engines; we must improve the physical condition of our property, so as to carry, with reasonable safety, the people and property tendered us for transportation.

Of course, in addition to this, we must do all we can to protect the lives and limbs of our employees. This I insist we have done and are doing as fast as conditions will allow. The coupler and air-brake question for freight trains is a comparatively new one. We have never been entirely satisfied that automatic couplers and air brakes would work, and until sufficient tests were made to establish this fact we did not feel justified in incurring the expense. We knew tests were being made by roads in other sections and felt therefore that we ought to wait until they had developed the safest and best appliances.

It has been suggested in argument that because the railroads of the country are largely owned by persons residing at places other than where the roads are operated, the work of improvement is retarded. This is to argue that people who have money invested in railway property don't know how best to take care of their investments.

Does any one suppose that the man who is largely interested in railroad property will refuse to avail himself of the opportunity to get rid of the burden put upon him by the courts of the country for the loss of life and limb to employees as soon as he is shown the way? Not a bit of it. Show him how and he will do his utmost.

Has it ever occurred to the gentleman who made this suggestion why people in the sections where railroads are located have such small pecuniary interest in them? I will tell him, and for the purpose of

illustration will take a single road in my section, which is perhaps the best one. The road in question has not averaged a cash dividend of 1½ per cent per annum during the last fifteen years and has at various times had difficulty in paying the interest on its bonds. This road, moreover, is not bonded for what has been invested in its construction. The stock therefore represents a good part of the cost of constructing the line. I am speaking of the Louisville and Nashville. Who is there in our country, where money is loaning at 7, 8, 9, and even 10 per cent per annum, that wants a railroad investment with the possibility of a 1½ per cent dividend per annum? It is for this reason that railroad property is largely owned in New York and elsewhere, where capital is abundant and where they are in a position to let their investments remain in the hope of building up the country and of ultimately deriving something from the advance in the price of the stock and an advanced rate of dividend.

Mr. Chairman, the railroads of my section are not able to incur the expense of these improvements now. Some of the largest of them are in the throes of trouble to-day, and there is no telling where they may land within the next thirty days. We are not in a condition, I say, to have forced upon us an extraordinary expenditure at this time, but we believe as soon as the utility of the automatic coupler and air brake is established beyond question we shall be able to keep pace with the demands of the times. We have kept pace with the progress and improvement made up to this period and think we shall continue to do so, but we can not afford to spend our money on experiments. We must know that we are right before we can afford to go ahead.

The CHAIRMAN. Are you actually applying any automatic couplers?

Mr. STAHLMAN. Yes, sir. I say frankly not to the extent that has been done in other sections, for the reasons I have given.

Senator HARRIS. You are proceeding in that direction as fast as you can?

Mr. STAHLMAN. Yes, sir; and especially as rapidly as we feel justified, in view of the doubt which has surrounded the expediency of adopting these couplers up to this time.

Senator WOLCOTT. The men employed by your roads do not work under any contract that they will not sue for damages sustained? They can leave the road whenever they wish?

Mr. STAHLMAN. They are under no such contract, and can leave whenever they wish.

Senator HARRIS. Is the percentage of killed and wounded increasing or decreasing?

Mr. STAHLMAN. The statistics do not show whether there is an increase or a decrease. There ought to be a slight ratio of increase, because the number of men and the mileage are increasing.

Senator HARRIS. Taking into consideration the greater number employed and a larger number of miles, is the percentage increasing or decreasing, in your opinion?

Mr. STAHLMAN. I think, if anything, it is decreasing. The men are growing more careful. They have more experience. They have been growing more and more so all the time.

We have, as a rule, a more reliable and better class of men in our service than you will find in the East or the larger cities of the West. The majority of the employees of southern roads were born and

raised in the sections traversed by the roads; many of them own their little homes, are educating their children, and are the heads or parts of happy households. They do not run from one city or section to another or from one road to another. They are not agitators or disorganizers; they are, as a rule, quiet, good citizens and faithful workingmen.

I do not understand that these people, our employees, have asked for legislation of this kind. They appreciate our conditions; are willing to let the matter rest and let us work out the problem, which they know will be done in due time.

The CHAIRMAN. If no legislation is enacted are you likely to have the means, and will you be able, to equip your cars with automatic couplers in any reasonable time?

Mr. STAHLMAN. Yes, sir. It costs very little more to put on the automatic coupler when the cars are built.

Senator HARRIS. When the Southern roads send a car to the shop for repairs do they have the automatic coupler put on?

Mr. STAHLMAN. Not always. I can not state positively as to that. There has been much doubt up to this time regarding the utility of these couplers. I think there is very little doubt about it now. I think we have pretty well made up our minds that the coupler recommended by the master car builders is the coupler that ought to be used, or one of that type. I assume, in view of the progress which has been made, with 20 per cent of the total number of cars in the United States already equipped with these couplers, that during the next year there will be added 25 per cent, because of the increased certainty of the success of the coupler, and the year following will show a still greater increase, so that within four years practically all the cars of the country will be equipped, leaving the entire responsibility with the transportation companies as to what particular type they will adopt, but giving them the opportunity to improve upon the type, if during that period something better should develop.

Senator HIGGINS. Do you know whether or not on the new freight cars now being constructed they are putting the old link-and-pin coupler?

Mr. STAHLMAN. In my section in some cases, up to this time, yes, but I doubt if many cars will be constructed without the automatic coupler hereafter. Colonel Haines, the president of the American Railway Association and vice-president of the Plant system, one of the leading railway systems of the South, has told you what he thinks of the question and what the Southern roads will probably do. He has given the subject a great deal of thought. What he said should therefore have weight with your committee.

The CHAIRMAN. When do you think the roads of the South will be ready to adopt the automatic coupler?

Mr. STAHLMAN. Two and a half years will, I am quite sure, bring us to a point where a conclusion will be reached.
to a point where a conclusion will be reached.

The CHAIRMAN. Are you going to wait two and a half years to see whether anything better is invented?

Mr. STAHLMAN. I think not. We feel a very deep interest in this matter, not merely because we have the damage to pay if our men are injured, but because we feel an interest in the safety and well-being of our employees.

The CHAIRMAN. You can readily see if you wait to see whether something better is developed from year to year you are never going to do anything.

Mr. STAHLMAN. I grant that; but we have already pretty well concluded that the type recommended by the Master Car-Builders' Association can be made a success, and it is only because the southern railroads were so poor and could not afford to experiment with anything surrounded with much doubt that there has been much delay. We know that tests and experiments were being made, and as soon as satisfied which is the best coupler to adopt we shall be ready to go ahead with the work.

Senator GORMAN. What would be the result financially if you were required to equip all your cars within five years?

Mr. STAHLMAN. It would cost, perhaps, $10,000,000.

Senator CHANDLER. Why would it cost that sum?

Mr. STAHLMAN. I think that I can safely say that the railroads of the South will average four cars to the mile. There are, say, 25,000 miles, making a total of 100,000 cars.

Senator JONES. You say there are a hundred thousand cars?

Mr. STAHLMAN. Yes, sir.

Senator JONES. At $25 a car that would be $2,500,000.

Mr. STAHLMAN. You are quite right, Senator, if confined to couplers alone, but with air brakes included the cost will not fall much short of $100 per car, or $10,000,000.

Senator HIGGINS. Would it do you any worse harm than drive you to foreclosure, and are you driven to that point of resisting foreclosure by killing people?

Mr. STAHLMAN. Not at all; we are simply awaiting developments.

Senator HIGGINS. They can sell you out. Some people will buy a railroad and run it without killing people.

Mr. STAHLMAN. I have not heard of such a road. I didn't suppose, at all events, that Congress cared to indulge in legislation calculated to wreck railroads; that it would rather aid in building up than pulling down, and [laughingly] that Congress, if so much impressed with the necessities of the hour in respect to couplers and brakes, might see fit, instead of indulging in a wrecking process, to appropriate money to make these improvements for such roads as are not in a condition to do so themselves.

Congress has in the interest of the public weal, under the "public-welfare" clause of the Constitution, done much in this direction. The history of legislation shows that Congress has appropriated from time to time to improve the navigation of the lower Ohio, Mississippi, Tennessee, Cumberland, Alabama, and other rivers of the South, sums aggregating over $60,000,000. These appropriations (at no time antagonized by the railroad people of our section), have largely increased the competitive forces of river transportation and to that extent reduced the earning capacity of the southern roads. If it was proper for Congress to do this in the interest of competition and trade, why not right to appropriate a small sum in the interest of life and limb?

Senator WOLCOTT. Do you understand that the Janney coupler is an insurance against accident?

Mr. STAHLMAN. I do not.

Senator GORMAN. Do you think it would be safe for Congress to specify through a commission or otherwise any particular coupler?

Mr. STAHLMAN. I do not. I think it would be a great mistake. We had to change the Westinghouse brake and the coupler used on passenger trains after they had been in use for some time, and the probabilities are changes in the Master Car Builders' type for freight cars will also be necessary. For Congress to say, or appoint a commission with power to say, what type of coupler or brake is to be used will be the means of shutting off all improvement in the future, no matter in what form that improvement shall present itself.

This inquiry, for which I beg to thank the Senator, brings up the additional question as to what railroads have done to minimize the risk of running freight trains, and thus promote the safety of their employees.

Some years ago it was no uncommon thing to see trains of freight cars of many different heights and size. The bumper and drawbars of one car would be two and a half feet from the track, while those of the car adjoining would be three to three and a half feet. The cars thus constructed could not be coupled at all, except with the use of a crooked link. It was extremely difficult and dangerous to couple and uncouple these cars. It was for the purpose of uniformity in the construction of the cars that the Master Car Builders' Association was founded, and as a result of the efforts of this association we now rarely see a car with bumpers not of uniform height. The association has gone so far that the wheels and axles are uniform; the body of the car is practically uniform. Everything has been done to bring about uniformity, and just as fast as conditions would permit the railroads have adopted the recommendations of the Master Car Builders' Association. We of the South have, for the reason given you, been a little slower probably than the rest, but in the main have kept pace with the progress and development of the age, and shall not be far behind in respect to the pending matters when all reasonable doubt shall have been removed as to the utility and safety of the appliances in question. That we have about reached this point I am quite persuaded.

I thank you, Mr. Chairman and gentlemen of the committee, for the patient and attentive hearing which has been accorded to me.

STATEMENT OF EDWARD A. MOSELEY.

Mr. MOSELEY. I desire to read a communication from Mr. Spencer Smith, one of the railroad commissioners of Iowa, who has spent much time in the study of this entire subject. The communication is addressed to the honorable chairman and members of this committee. As secretary of the committee on safety appliances of the national convention of railroad commissioners, I desire to read this communication, Mr. Smith being a member of that committee. It is as follows:

IN THE MATTER OF SAFETY APPLIANCES FOR FREIGHT CARS.

To Senator Cullom, chairman, and the members of the Senate Committee on Interstate Commerce:

GENTLEMEN: It may be proper at the threshold of this conference to ask your attention to a brief statement of the preliminary work

already done by the committee of which I have the honor to be a member, together with a review of some of the conditions that led up to the formation thereof.

At the national convention of the railroad commissioners held at the offices of the Interstate Commerce Commission, Washington, D. C., on May 28 and 29, 1890, the following resolutions were adopted:

Resolved, That the respective States should require, either directly by law or indirectly through the instrumentality of their railroad commissions, each railroad corporation subject to their jurisdiction to place driving-wheel brakes and apparatus for train brakes on every locomotive constructed or purchased by it, and train brakes upon every freight car hereafter constructed or purchased by it, and upon every freight car owned by it, the coupler or drawbar of which is repaired by it, an automatic coupler of the Master Car Builders' type at each end of the car.

Resolved, That Congress, either directly by law or indirectly through the instrumentality of the Interstate Commerce Commission, should take similar action.

Following up the position taken at this conference, the national convention held in Washington on March 3 and 4, of this year, after much discussion, appointed a special committee to prepare resolutions upon this question. The report of the committee was as follows and was adopted unanimously.

Resolved, First. That a committee of five be appointed by the Chair to urge upon Congress as soon as possible after the opening of the next regular session, the imperative need for action by that body calculated to hasten and insure the equipment of freight cars throughout the country with uniform automatic couplers and train brakes and the equipment of locomotives with driving-wheel brakes, and present and urge the passage of a bill therefor.

Second. That the committee, before presenting the bill to the appropriate Congressional committee, be requested, after public notice, to give a hearing to accredited representatives of such organizations of railroad officials or employees as may desire to be heard.

Third. That the secretary of this convention act as secretary of this committee.

Judge Cooley named the committee as follows: Hon. George G. Crocker, Massachusetts; Hon. James C. Hill, Virginia; Hon. Spencer Smith, Iowa; Hon. William E. Rogers, New York; Hon. John H. King, South Dakota. Hon. Edward A. Moseley became secretary by the terms of the resolution.

It will be seen that in the last adopted resolution the type of couplers was not specified, as was done in the resolution adopted the year previous, simply declaring for "uniform automatic couplers, train brakes, and drive-wheel brakes."

On February 28 the committee held its first meeting at Washington City, perfected its organization by the selection of Hon. George G. Crocker, of Massachusetts, as chairman, and prepared a list of questions to be sent to all of the railroads of the United States, viz:

(1) What is the total number of freight cars owned, leased, or otherwise controlled by your company?

(2) How many are equipped with automatic couplers?

(3) State the kind of couplers used and the number of cars equipped with each kind.

(4) With what kind of coupler do you cause your freight cars to be equipped?

(5) How many cars have you equipped with train brakes? State the name of the brake used.

(6) How many locomotives does your road own, lease, or control? State the number equipped with driving-wheel brakes.

(7) Please state in what way, in your opinion, the equipment of freight cars with uniform automatic couplers can best be hastened.

On November 10 and 11 the committee was in session in the Chamber of Commerce, New York City, and heard representatives from the American Railway Association, Brotherhood of Locomotive Engineers, Switchmen's Mutual Aid Association, Yardmasters' Association, Railway Employees' Association, Master Mechanics' Association, Order of Railway Conductors, Brotherhood of Railway Trainmen, members of safety appliance committee of American Railway Association, and others.

Of the roads responding to the questions sent out, 69, representing 13,014 miles of road, favored national legislation; 88, representing 46,791 miles of road, favored voluntary action on the part of the companies; 2, representing 139 miles, favored state legislation; 17, representing 11,916 miles of road, favored the Master Car Builders' type of coupler; 10, representing 4,830 miles of road, favored other couplers; 15, representing 9,418 miles of road, believed the matter still in the experimental stage, and 145, representing 38,986 miles of road, expressed no opinion as to the best means of bringing about uniformity. The Atchison, Topeka and Santa Fé and one other road favored the Safford automatic link-and-pin coupler. The fact was developed that there are now in use about 1,200,000 freight cars, of which 200,000 are equiped with automatic couplers of various kinds of the Master Car Builders' type, and about 50,000 of other types. Of the 27,000 locomotive engines 17,000 are equipped with driving-wheel brakes. About 100,000 freight cars are equipped with Westinghouse train brakes, and some 15,000 with other types. Advanced figures furnished by Secretary Moseley, of the Interstate Commerce Commission, showing the killed and injured for the last fiscal year, were read as follows: For the year 1889—trainmen killed, 1,972; injured, 20,028; total, 22,000. For the year 1890—trainmen killed, 2,451; injured, 22,390; total, 24,841; an increase of killed and injured of 2,841, due to all causes.

Of these accidents, those due to the coupling and uncoupling of cars in 1889—killed, 300; injured, 6,767; total, 7,067. For the year 1890—killed, 369; injured, 7,841; total, 8,210; an increase of 1,143.

Falling from cars, year 1889—killed, 493; injured, 2,011; total, 2,504. For the year 1890—killed, 547; injured, 2,348; total, 2,905; an increase of 894.

The committee heard representatives of all the associations. Col. H. S. Haynes, president of the American Railway Association, speaking for that body, said that it has a standing committee on safety appliances that had gone through the same course of investigation as the committee now holding this session. They hoped to lessen the loss of life and limb. They represented 125,000 miles of road and had adopted the vertical hook type of couplers as their standard.

The railroad companies themselves had developed this type. His association had helped it along, but it was only within the last few years that something had been found to meet the requirements. The demand for this coupler was now almost universal. While it might not be the best thing, it was the best up to this time. Legislation calling for one kind of coupler would block progress. A million more cars to be equipped, at $25 each, meant $25,000,000; all the coupler makers of the country could not turn out over 200,000 coup-

lers per year, and this equipment meant five years to replace the link and pin, to say nothing of repairs and new cars. The railroad companies would do it as fast as possible. Engine brakes are now put on practically all locomotives ordered. The freight-train brake was not yet in the condition it ought to be for long trains. The air brakes cost twice as much per car as automatic couplers. It meant an outlay of $50,000,000 to fully equip the rolling stock of the railways. That it is not claimed that the Master Car Builders' type is the best form that can be devised, but that it is the best that has been made up to date, and the association does not feel that it can go further. That the railroads make a wider application of safety appliances in this country than they do in Europe, and in this particular case have devoted a great deal of time and money to the production of the type of coupler that has been recommended. On the Plant system there are now but two cars fitted with Master Car Builders' couplers, but there are 1,000 cars under construction, each of which will be equipped with the Master Car Builders' type, and I am told that this is universal on new work, showing how rapidly this work is going forward. It is doubtful whether the capacity of all the coupler manufacturers in the country exceeds 150,000 cars a year. The truth is, said Colonel Haynes, the companies are advancing as fast as possible where their mechanical and financial ability is concerned.

Mr. M. N. Forney, speaking for the committee of the Master Mechanics' Association, stated that the association which he represented was devoted to the mechanical development of railway rolling stock, and that for ten years this matter of a suitable coupler has been before the association, but the first actual steps were taken in 1884, when a committee reported to the association at Saratoga favoring the adoption of the vertical plane hook coupler, but it was not until 1887 that the contour lines were adopted by a two-thirds vote and a letter ballot. The owners of the patents on these contour lines surrendered their rights, so that while there are numerous patents on the locking devices and details the contour lines are free for all.

No one is prepared to say that the type adopted fulfills all the requirements. There is only one class of men who are perfectly satisfied, and they are the inventors. Hence any legislation enforcing the adoption would result in the use of something not complete and not altogether desirable.

Legislation should take the form of recommendations, like the enactments of the British Board of Trade; it should provide for publicity, for recommendations, for acting as a sort of recording angel on the acts of railroad managers, and depend upon practical developments for the rest.

"It is safer for the present," said Mr. Forney, "to leave it in the hands of the railroads."

Mr. T. N. Ely, of the Pennsylvania Railroad, said that his company was putting these couplers and air brakes on as fast as possible, and no law could hurry it any.

Vice-President E. B. Thomas, of the Erie Railroad, said that his company was going as fast as possible in both M. C. B. couplers and air brakes, including cars repaired. In time they would refuse to have cars equipped with link-and-pin couplers.

Lucius Tuttle, New York, New Hampshire and Hudson, said that

his road was advancing without legislation. All cars repaired had M. C. B. couplers put on all their new cars. All their engines were having air brakes put on. The coupler subject was taking care of itself. All the cars in the country would be equipped in about five years.

Maj. E. T. D. Myers, president Richmond, Fredericksburg and Potomac Railroad, spoke for the committee on safety appliances of the American Railway Association. They were doing all they could with both couplers and power brakes. He thought legislation the wrong way to do it. Public opinion was more powerful. That all the Virginia roads were putting them on; also the roads south of there, and without legislation. "No improvements in transportation," *said Major Myers*, "*had come from anything but public opinion*; that the Janney coupler was born in Virginia, and the roads there put it in use before there was compulsory legislation anywhere.

C. W. Bradley, general superintendent West Shore Railroad, said that all their fast-freight cars had air brakes and M. C. B. couplers. All his connections were putting them on. He would like to reject all cars without M. C. B. couplers.

Mr. Frank Sweeney, of the Trainmen's Mutual Aid Association, said that the present varieties of draft irons were a great danger to switchmen. They could not educate themselves on the various appliances, there were so many. Something should be done to prevent the injury of switchmen. They were in favor of uniformity of height of cars. With the present mixture of couplings cars had often to be stopped to pull the pins. With the M. C. B. type and a link it might fly either way in concussion. They wanted a uniform type of drawbar.

Regarding legislation, there should be something done to enforce the standard height of cars, and some steps should be taken, either by legislation or otherwise, bearing on this subject.

Mr. D. B. Sweeney, of the Trainmen's Aid Association, favored the link-and-pin type. The vertical hook was too dangerous. They had to go between the cars to open the knuckle. The coupling apparatus was always broken. With the link and pin they knew when a car was cut, but when they threw up the lever they could never tell whether it would open or not. There was nothing better than a link and pin. "Besides," said Mr. Sweeney, "it is still necessary to go between the cars to open the knuckle, even when in good condition, and they will not couple on curves."

Mr. John H. Hall, of the United Order of Railway Employees and editor of the Switchmen's Journal, described vividly the duties of yard switchmen and the difficulties they labored under. Something should be done for them. The railroads were, he thought, doing all they could for them. He had many years' experience in yard work and preferred the link and pin. The conditions under which these men worked were getting worse, and legislation was necessary unless the railroads accomplished more. A greater number of men were hurt every year. If nothing but vertical planes were used they would still have to go between the cars, they were out of order so much. He believed the link and pin could be as automatic as the vertical plane. Yet if all cars had vertical-plane couplers the condition would be a thousand times better than they were to-day. The switchmen favored uniformity.

Mr. A. D. Shaw, of the Yardmasters' Association, favored automatic couplers and uniform length of drawbars and cars. There were too many good drawbars and too much mixture of good and bad.

Mr. Heberling, of the Switchmen's Aid Association, said that they favored a uniform link-and-pin type of a uniform drawbar, anyway. If two cars of the M. C. B. type were set together without opening the knuckles, they were sure to break. Give them a uniform drawbar of some kind and it would save the lives of many men.

Mr. Roach, of the same association, followed, speaking of the danger of coupling the link and pin with the M. C. B. type. All of the new type of couplers were a detriment and an annoyance to the switchmen.

J. T. Chamberlin, master car builder of the Boston and Maine, said that their employees, who had spoken, knew better what was wanted than the officers. The men of his road all favored the link-and-pin type of coupler. The vertical-plane drawbars had broken badly on his road, and now they had none.

William McWood, of the Grand Trunk, said that personally he was opposed to the vertical-plane type. The switchmen's views coincided with his. He did not think the M. C. B. type gave good satisfaction. The pin still remained, and if it became bent the knuckle would not work. Neither were the knuckles interchangeable, which was a serious objection. More satisfaction and better results could be had from a good automatic link-and-pin coupler.

G. W. Rhodes, master car builder of the Chicago, Burlington and Quincy Railroad Company, was of the opinion that they should not make haste too quickly, and while we may not feel warranted in giving an unqualified indorsement to the type that has been adopted, still it does seem to be the best that has yet been devised. The Chicago, Burlington and Quincy Railroad Company has paid the closest attention to the coupler question, just as it did to the brake matter in 1887. It has paid out money freely in the development of safety appliances, and feels that there is no need of legislation to coerce it into the adoption of the coupler or of automatic brakes. At present there are in course of construction for the road 2,500 cars, of 60,000 pounds capacity, which will be equipped with M. C. B. couplers and air brakes.

Hon. L. S. Coffin closed the hearing, appealing in the name of the associations represented by him for positive legislation, compelling the adoption of the M. C. B. coupler and train brakes.

The committee had a conference after the adjournment of the public hearing at which there was a free and full exchange of opinions and an agreement reached that each member of the committee should formulate a bill covering the needed legislation and submit the same to the others for their approval, the bill receiving the majority approval to become the committee bill. Shortly after the November meeting, two members of the committee ceased to be railroad commissioners, and so far as I am informed took no further action in the matter. A bill now in the hands of the secretary of the committee. Hon. Edward A. Moseley, has the approval of Mr. Rodgers, of New York; Mr. Hill, of Virginia, and the subscriber, a majority of the committee and all of the present active members thereof.

That you will report this proposed bill back to the Senate as the bill of your committee is respectfully urged.

For many years railroad employees have suffered accidents resulting in personal injury and death, largely for want of uniformity in the appliances used in handling cars. With the beginning of railway car service, while the danger of the link-and-pin coupler and the hand brakes existed, it is known to have been in a proportionately less degree, for the reason that both brakes and couplers were uniform, or nearly so, and the trainman or yardman handling them always found the one that he handled to-day the same as that handled on yesterday. Inventive genius, however, ever active, has produced a multiplicity of couplers, many of them of great merit and in use on the different lines, and this greatly complicated matters and increased rather than lessened the danger.

State legislation providing for safety appliances in several States followed these inventions, and State commissioners in one State approved one type, in another a different type, and with each step intended to be in advance the danger grew alarmingly. What is the remedy? Uniformity; and with so large a per cent of the cars passing across State lines this uniformity will come most rapidly when provided for by Federal legislation. That it will cost money to bring about this reform is admitted, but in what direction can the Government make expenditures that will bring results more to be desired? The Government has a life-saving service doing duty on the coast; a grand and humane service it is. About $1,000,000 was expended on it last year and 350 lives saved, while 2,451 were killed last year in the railway service and 22,000 injured; and may not the General Government properly do something to decrease materially this terrible loss?

Many of the leading lines of the country are rapidly supplying their equipment with safety appliances, but not all in the line of uniformity. Then there are other lines that are making but little, if any, progress in this direction. The remedy is Federal legislation to compel the dilatory roads to properly equip their cars or to use the alternative of paying the expense attending the transfer of tonnage from their cars to the equipped cars of other companies.

That the present trend of the strong lines is in the direction of uniformity and safety may be illustrated by the fact of the recent adoption of the M. C. B. type of coupler by the Boston and Albany Railway Company after much strenuous objection to it, because the action of the New York Central and other important lines virtually compelled such adoption. It is the obstinate manager and the manager of impecunious lines who stand in the way of progress in the direction of uniformity and safety, and to reach such cases is the strong arm of the law invoked.

It may be contended that the Interstate Commerce Commission now has authority to regulate these matters under its general powers of "inquiry into the management of the business," etc., but it has not so far in its work exercised that authority, nor is it likely to do so in the multiplicity of duties imposed upon it.

What is required is a law that will keep up the progress now being made, allowing a reasonable time in which the reforms are to be brought about, with sufficient elasticity to permit extensions of time in worthy and deserving cases, as is provided for in the English law of 1889, and followed in the bill formulated by the safety-appliance committee which is now before you for consideration.

We are passing through the transition period, with all its attending terrors followed by increased fatalities and injuries, and any legislation that fails to provide for uniformity is a step backward. Uniformity in the drawbar, in the height of the car, and in all of its parts and attachments is of pressing importance and can not be given too much consideration.

SPENCER SMITH, *Commissioner.*

I will also read the bill Mr. Smith has prepared:

AN ACT to promote the safety of railway employees and travelers and requiring common carriers engaged in interstate commerce to equip their cars with automatic couplers of a standard uniform type and continuous train brakes and their locomotives with power brakes, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

SECTION 1. That on and after the 1st day of January, 1893, it shall be unlawful for any common carrier subject to the provisions of the act entitled "An act to regulate commerce," approved February 4, 1887, to put into use on its line any new locomotive engine, to be used in moving interstate commerce, as defined in section 1 of said act, that is not equipped with a proper power brake.

SEC. 2. That from and after the 1st day of January, 1895, it shall be unlawful for any common carrier subject to said "act to regulate commerce" to use on its line any locomotive engine in moving interstate commerce, as defined in section 1 of said act, that is not equipped with a proper power brake.

SEC. 3. That on and after the 1st day of January, 1893, it shall be unlawful for any common carrier subject to the said act to regulate commerce to put into use on its line for the purpose of moving interstate commerce, as defined in section 1 of said act, any new car or any old car that has been to the shops for general repairs to one or both of its drawbars that is not equipped with automatic couplers of a standard type, so constructed that such car can be coupled to and uncoupled from the next car without the necessity of a person going between said cars.

SEC. 4. That on and after the 1st day of January, 1897, it shall be unlawful for any common carrier subject to the said "act to regulate commerce" to haul or permit to be hauled or use on its line any car used in moving interstate commerce as defined in section 1 of said act, unless such car is equipped with automatic couplers of a standard type, so constructed that such car can be coupled to and uncoupled from the next car without the necessity of a person going between said cars.

SEC. 5. That from and after the 1st day of January, 1893, it shall be unlawful for any common carrier subject to the said "act to regulate commerce" to put into use, to haul or permit to be hauled on its line for the purpose of moving interstate commerce, as defined in section 1 of said act, any new car or any old car that has been to the shops for general repairs to its brakes, that is not properly equipped with continuous train brakes sufficient to control the train that can be operated from the locomotive.

SEC. 6. That from and after the 1st day of January, 1893, it shall be unlawful for any common carrier subject to the said "act to regulate commerce" to put into use, to haul or permit to be hauled on its line any car used in moving interstate commerce, as defined in section 1 of said act, that is not properly equipped with continuous train brakes sufficient to control the train that can be operated from the locomotive.

SEC. 7. That any such common carrier violating any of the provisions of this act shall be liable to a penalty of $100 for each and every such violation, to be recovered in a suit or suits to be brought in the district court of the United States having jurisdiction in the locality where such violation shall have been committed, by the United States district attorney of such district, and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred.

SEC. 8. That on the 1st day of July, A. D. 1892, each common carrier of the United States subject to said "act to regulate commerce" shall file with the Interstate Commerce Commission a letter ballot setting out the type of standard automatic coupler that it prefers, said Commission to have full authority to provide for such ballot and to decide upon the validity of all votes cast. The vote

shall be based upon the number of freight cars owned by each line, and the type of coupler receiving 60 per cent or more of the entire votes entitled to be cast shall be the "standard type" of automatic coupler provided for in this act.

If the roads shall fail to establish a standard type of coupler, as herein provided, then the standard type of automatic coupler shall be that known as the Master Car Builders' type; that is to say, said coupler shall be of such size and dimensions, and shall conform to such contour lines as are set forth in plates 6 and 7 of the printed official report of the proceedings of the twenty-fifth annual convention of the Master Car Builders' Association, held at Cape May, N. J., June 9, 10, and 11, 1901, as modified by a circular from the executive committee of said Master Car Builders' Association, dated Chicago, September 1, 1891, signed by J. W. Cloud, secretary.

SEC. 9. That the Interstate Commerce Commission shall have power, upon a showing which they deem reasonable, to extend the time within which any particular carrier shall be required to comply with the provisions of this act, provided that no extensions shall be made beyond 1900. After the year 1900 any common carrier may refuse to accept or receive any car used in interstate commerce that is not properly equipped as required by this act, and the carrier leading or starting such car shall be liable for the damages, if any result therefrom.

SEC. 10. Any employee of any common carrier engaged in interstate commerce, as defined in the act of February 4, 1887, who may be injured by any locomotive, car, or train in use contrary to the provisions of this act shall not be deemed guilty of contributory negligence, although continuing in the employ of such carrier after habitual unlawful use of such locomotive, car, or train had been brought to his knowledge.

I do not desire to occupy your time at any length, but while I appreciate to the fullest extent the philanthropic work of Mr. Coffin, who has spent, as I know, a great deal of time in the study of this subject, I feel it my duty to state to you one or two things. An inquiry was sent by me to every railroad in the United States, addressed to its president, asking him, on behalf of the committee on safety appliances, what he favored as to couplers.

Mr. KING. That is our committee?

Mr. MOSELEY. Yes, sir. Seventeen roads, representing 11,915 miles, expressed themselves in favor of the Master Car Builders' type, the type which Mr. Coffin urges upon this committee.

I do not know that I wish to say anything else except that you have had a number of bills and a great many different ideas presented to you, but with it all there has been no criticism of certain provisions of almost every one of the bills, and that is as to the uniform height of the drawbars of cars, the use of train brakes, and the use of driving-wheel brakes upon engines. Those are things to which there has been no antagonism shown and in regard to which the people who are leading in this move ask Congress to legislate. No one representing the railroad has opposed any of those propositions. It is simply a question of uniformity, and, as Senator Harris has so thoroughly stated to the gentlemen here, there are thousands of men to be injured and hundreds, perhaps thousands, to be killed in the transition stage from anything, from the old link and pin to any other coupler, and the only desire that I can have is that that stage be lessened and the length of time be shortened so that as few men as possible may have to sacrifice themselves for the benefit of those who may come after them.

STATEMENT OF ROSWELL MILLER.

Roswell Miller, president of the Chicago, Milwaukee and St. Paul Railroad, submitted the following statement:

In re the proposed bill for an act entitled "An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes."

SECTION 1. There is no objection to this section.

SEC. 2. The date should be January 1, 1897, for five years' time will be needed in making the necessary changes.

SEC. 3. The date should be changed to January 1, 1897. The time fixed by this section is especially objectionable, so far as it relates to cars upon which general repairs must be made. It is not always possible for railroad companies to get sufficient equipment, and again it frequently happens that they have in their possession such a large number of cars upon which general repairs should be made that a great deal of time is necessary in which to make repairs. Some of the smaller roads might be able to make changes within the time named in this section, but it is morally certain that many of the larger roads could not do it. A date should be named which will enable all of the railroads to make changes without loss or damage and without interfering with their regular business.

SEC. 4. There is no objection to this section.

SEC. 5. This section is objected to for the reason that it is possible to haul with entire safety in freight trains a certain percentage of cars which have no air brakes. Heretofore in bills relating to this subject it has usually been provided that after a fixed date no trains should be run without sufficient cars equipped with air brakes to control the movements of the train. Such a provision should be in this section.

SEC. 6. As a fundamental proposition, whatever coupler a railroad company may think to be the best it has the right to buy and use; another company may, in good faith, prefer another coupler, buy it and have a right to use it. The circumstances of railroad traffic make it necessary for the roads to use couplers which will work together satisfactorily, and which will be as safe as possible. The railroads are already suffering from what may be called a combination of the Janney-Hein coupler, by means of which the companies are charged and compelled to pay $10 per car more than the actual cost of the coupler. If an obligation be placed upon the companies to adopt automatic couplers within a certain time, the conditions of railroad traffic will necessarily compel them to provide an interchangeable coupler.

SECS. 7, 8, and 9. Nothing need be said of these sections at this time.

SEC. 10. This section should provide that, when common carriers have adopted the devices that they are compelled to adopt by law, they shall not be liable for any damage that may occur to persons or property in consequence of the use of such devices, unless such damage is caused by failure of the common carrier to use due diligence in keeping the same in order. It is believed by many good railroad men that there will be more accidents and more people hurt by the use of

the automatic coupler than by the use of the link-pin coupler—at least in the present imperfect form of the automatic coupler. If railway companies are obliged by law to use such devices they should be relieved from the consequences of such use, unless they negligently fail to keep the same in repair. If Congress determines that a device of a certain kind should be used, and the railway companies thereupon make use of such device, it is nothing more than just they should be absolved from all liability incident to such use, except where they are guilty of negligence in keeping such device in good order.

Generally. No legislation is necessary with relation to couplers or air brakes. Railway companies are progressive and are going ahead just as fast as they can. The importance of getting the best air brakes and couplers and of reducing accidents to a minimum is realized by all capable railway men, and they are constantly endeavoring to find the best means for the accomplishment of the desired end. It is believed that they will reach this result quicker without legislation than with it. The selection of a device should not be put into the hands of the switchmen or the locomotive firemen, for they are not capable of judging, as they are without actual experience in the use of the various couplers, and because they have not sufficient mechanical skill to enable them to decide correctly. Every railway company has in its employ skilled mechanics and well-informed and responsible officers, and it is submitted that they are the proper persons, and the only proper persons, to determine what form of coupler or brake is best. Such men are sure to take into account not only durability and safety, but the question of cost, and the latter is a thing which would not be considered by a committee of switchmen or firemen, for they would not know how to consider it, even if they wished to.

Respectfuly submitted.

CHICAGO, MILWAUKEE AND ST. PAUL R. R.
ROSWELL MILLER, *President*.

STATEMENT OF BRITTON & GRAY.

Britton & Gray, on behalf of the Atchison, Topeka and Santa Fe Railroad Company, submitted the following statement:

The necessity and desirability of such uniform coupling device as will give certain, safe, and continuous interlocking connection between the freight cars of all railroads is recognized by all the carriers, and constant effort is being put forth to accomplish that result. Among the many thousands of patented inventions on this subject, however, none have as yet been found combining the desired elements of safety, certainty, and durability.

In this connection, President Manvel, of this company, remarks:

Two or three years ago the Master Car Builders gave it as their judgment in their meeting that what is known as a "vertical plane coupler" ought to be adopted; and while there are different patents covering this invention, it was agreed that certain contour lines on the different devices should be used so that they would be interchangeable and couple with each other, even although of different make and of different patents. Our company, with no usual enterprise, purchased between 4,000 and 5,000 of these couplers at an expense of about $60,000, and find now, after practical use, that it has probably got to throw them all away. It is found that after some use and when the surfaces become worn somewhat they will not stay coupled together, and to-day it is impossible to get men operating on the mountains to take a train over until the entire equipment is coupled up with the ordinary link and pin. It is found that one of these

devices that has been in use, say from two to three years, will not couple properly with another device that is perfectly new. It is found, also, that the vertical plane device which has been used more or less in connection with the other couplers is not built so that it will bear the shocks that come to it, and it is quite sure that if the opinions can be secured of all men on our line who have to use them, 95 per cent of them would say that they prefer the old link-and-pin coupler. I believe if any such legislation is attempted to be put upon the railway companies that it will only result in large loss without any compensating benefits.

With respect to the Master Car Builders' type coupler, President Manvel further states:

I give it as my deliberate judgment, after spending my entire business life of over thirty years in the various departments of railroading, that this law is disposed to work with great injustice to the roads and will fail to bring about the object desired, namely, safety to life and limb. It is not what the railways generally want, it is not what the men themselves would select who have to use them, and people seem to be proceeding on the basis that a change to the Master Car Builders' type will do away with the loss of life and injury to persons. That is, I understand, the fundamental reason for urging this bill.

You are advised that I have myself been urged to accept stock in one of these companies, that was to cost me nothing and was to secure my cooperation in the attempts that are now being made.

Please understand that no one is more keenly alive than myself to the desirability of adopting the best appliances to prevent injury to our own employees, but I look upon the present attempt as one not beneficial to the railroads and one not calculated to protect and save our men. For these reasons, this company having spent between $50,000 and $60,000 in a test of this kind of coupler, and having abandoned their use, I think I have good reason to object to the adoption on our line of a device that experience and observation lead me to believe will not bring about the result that all railroads are so anxious to accomplish.

As confirming President Manvel's views, derived from long experience, the action of the switchmen's convention, held at Buffalo, N Y., on September 24, 1890, is thus stated in the Chicago Evening Post of the same date.

PATENT COUPLERS CONDEMNED.

Buffalo, September 24.—The switchmen's convention last night selected Philadelphia as the next place of meeting. On the question of car couplers the vertical-plane or car-builders' type was almost unanimously condemned, the members citing the crippled delegates as a result of the many patent couplers used, and a motion was made and carried indorsing the link-and-pin bar with a recess on the side that affords protection to the operator.

Adoption of any system of coupler device involves an expenditure on the part of these carriers amounting to many millions of dollars. To thus provide the equipment of the Atchison, Topeka and Santa Fe system involves an expenditure of upward of $2,000,000.

Under these conditions of uncertainty as to the best uniform system which can be obtained and the enormous expenditure involved, it is imperative that there should be the most intelligent results before legislation is adopted compelling the use of any device or the expenditure of this vast sum. To that end a commission should be appointed of practical men, possessing in the highest degree the elements of experience and intelligence, to give immediate and thorough test of these couplers and to determine a uniform device which can be used with certainty, safety, and durability in transporting the vast commerce of the country. Such commission should be required to report within a year their conclusion and reasons therefor, to be then followed by mandatory legislation requiring the carriers to change and

adopt their equipment thereto within such reasonable time as the circumstances then developed may justly permit. Whilst the dictates of humanity and common business prudence furnish the strongest incentive to each carrier for the adoption of these safety appliances of highest approved merit, yet the uncertainty surrounding the subject as at present developed and the enormous outlay required in reaching the end desired forbid legislation which is not the result of most thorough and careful test and does not rest upon the judgment of the highest practical and expert authority.

Such commission would be representative of the carriers and the best elements of intelligence and practical knowledge among the employees having such vital interest in the results. When that is secured legislation can be based thereon with certainty and the carriers can move forward in accomplishing the final and great end desired, with the assurance that the vast outlay required will bring the result desired, and the employees whose occupation subjects them to the risks of injury and death can feel that the uniform device thus adopted combines the highest elements of certainty and safety which the inventive mind has then accomplished. The cooperation of all carriers in the work of such commission would be strong and immediate, and it is beyond question that the facilities afforded thereto would be complete and exhaustive.

Such an independent commission should not be influenced by the efforts made to secure the adoption of any particular device because of the immense profit which would follow to its promoters, but have in view solely of the great object to be attained. And the carriers, when thus given opportunity to assist and join in these tests and to aid in fullest degree the work of the commission, will feel assured at the conclusion thereof that the legislation thus recommended and thereafter adopted sprang from untainted sources, and prompted by the sole desire to reach the great end of protection to life and limb of its employees. The conclusion of the commission should receive affirmative adoption into law by Congress direct rather than by delegated authority.

In the hearings heretofore had before the committee, a commission of this character, and aiming at this result, is strongly recommended in the statement of Mr. Frank P. Sargent, grand master of the Brotherhood of Locomotive Firemen (pp. 58–61), and of Mr. John Downey, a practical switchman of more than twenty years' experience (pp. 62–64).

The practical views of these gentlemen are worthy of highest consideration, and examination of their statements will show the strong grounds of practical reasoning on which they are based.

Respectfully submitted.

BRITTON & GRAY,
Attorneys Atchison, Topeka and Santa Fe Railroad Company.

March 3, 1892.

At 12 o'clock m. the committee adjourned.

ADDITIONAL STATEMENT OF L. S. COFFIN.

Mr. COFFIN. Mr. Chairman and members of the committee, you will recollect that at the hearing before you on March 2 I gave way to Mr. Stahlman before I had concluded what I wished to say. At the

suggestion of your chairman, Senator Cullom, I submit the balance of my remarks in writing.

Allow me to say that my earnest plea for that form of a law which recognizes the very important work already done by the railroads through their ablest corps of mechanics in developing a uniform system for the safe coupling of cars arises from my intimate knowledge of the wonderful progress made in this direction, and of the substantial and practical unanimity at which the large majority of the railroad carrier corporations have at this time arrived. The great demand, you must conclude from all that has been said before you on this subject, is for uniformity.

Practically we have that now by the voluntary action of a large majority of the railroads. Hence I am earnest in my desire to show you that all that is now needed is some simple law requiring a compliance with the will and practice of the majority.

This is a nation where the majority rule is recognized. Legislation now for the 275,000 men in this nation engaged in the operating department of railroad services need not be groping in the dark.

If the committee feel any hesitancy about the matter and would like fuller information I will leave with them some copies of the reports of the transactions of the National Master Car Builders annual conventions and mark for convenient reference the parts more directly to the point under discussion. On page 28, of report for 1885, commences a discussion of the coupler question.

On bottom of page 33, see motion made by Mr. Wall, superintendent of shops of the Pittsburg, Cincinnati and St. Louis Railroad, controlling their 10,822 cars.

Page 39 shows resolutions adopted.

Page 128 shows committee appointed to test and collect information of couplers.

In report of 1886, on page 74, commences report of the above committee on the tests made at Buffalo, N. Y., which you will find very interesting, and commencing on page 81 and on will be found cuts of the couplers tested, which please see.

I would now call your special attention to the report of 1887, in which is record of the final report of the committee on safety couplers and the action of the convention thereon, and especially to the remarks of its chairman, Mr. Wall, on pages 194 and 195, now representing 11,474 cars, at that date, 1887. On pages 247, 248, 249, 250, 251, and 252 is the tabulated statement of the management of the roads giving the latter ballot on the action of the Master Car Builders establishing a standard coupler, showing over two-thirds for it, as well as the number of cars voted.

In report for 1890, on page 99, is found the action of the association instructing its executive committee to see to it that the standards adopted by them as to couplers were maintained.

In report for 1891—commencing on page 114—is found report of this committee on the maintaining of standard contour lines of the standard coupler. This is expressly interesting and instructive in view of the testimony of Mr. Downey that the standard couplers of different make would not couple. Please see ——— ———. In this connection the circular marked O, by Mr. Cloud, secretary of the association, and of the executive committee, is expressly important as it shows the careful work of these expert mechanics in maintaining

the exact lines of the standard coupler, and that from now on every coupler of whosesoever make will and must be exactly alike, and couplers made by A and B will as surely couple and interchange as two couplers made by A, or two made by B.

Before leaving these reports, allow me once more to call your attention to the number of cars represented in these annual meetings of this association. This you will find in each report, on the page before the index page; and in that of 1891 you will find 991,564 cars represented, which were at that time practically all the cars of the nation. This shows how unanimously the railroads themselves have agreed upon this matter of a uniform type of standard coupler. Hence it would be a fearful mistake to enact any law that would in any way disturb this harmonious progress. Legislation should be in line of this work. This is all I now have to say on the coupler question.

I will incorporate in my remarks at this point extracts from a letter from Mr. C. J. Ives, president and general superintendent of the Burlington, Cedar Rapids and Northern system of railroads. This system spreads out through Iowa, Minnesota, and Dakota.

OFFICE OF THE PRESIDENT,
Cedar Rapids, Iowa, February 27, 1892.

MY DEAR SIR: I have yours of the 24th instant, in regard to the placing of automatic couplers on freight cars, and in reply would say that since the Iowa law went into operation we have placed no others on cars undergoing repairs and expect to continue this until all our cars are equipped. We are also endeavoring to fill the demands of the law in respect to air brakes on cars and engines. * * * The transitory period, as you say, is a dangerous one, but the casualties on that account have not been so serious as I expected. The movement you mention of switchmen to do away with all automatic couplers and go back to the link and pin will, I trust, amount to nothing, as the hundreds and thousands of dollars already expended by railway companies for the present automatic couplers would be simply lost and no advance made in regard to improvement in this direction. I can not think it possible that any committee of Congress would recommend anything of that kind. * * * As so much has already been done in regard to this work, I trust you may be successful in making it interstate, that all the benefit possible may be derived from the heavy expense to which the railroads have been subjected.

Yours, truly,

C. J. IVES, *President.*

L. S. COFFIN,
Washington, D. C.

Also, a letter from Mr. J. M. Whitman, the general manager of the Chicago and Northwestern system, of which road the chairman of this committee has perfect knowledge. This system controls between 4,000 and 5,000 miles of road.

Mr. Whitman, under date of March 14, says:

DEAR SIR: In reply to the inquiry contained in your favor of March 12 in reference to the question of automatic couplers for freight equipment and the measures reproduced before the National Legislature referring to the same question, I have to say that the Northwestern Company has adopted what is known as the M. C. B. standard vertical plane coupler. It has been applying this coupler to its equipment for the last three years. The progress, however, during the first year was slow, as the device had to be perfected in several details of construction and in strength of material. We have, however, at present writing about 5,000 cars equipped with automatic couplers and air brakes. We are also applying automatic couplers and air brakes to some 5,000 freight cars purchased for this year's delivery, and in addition are applying automatic couplers and air brakes to our old equipment as rapidly as possible.

The close of this year will show probably 12,000 cars in the equipment of the Northwestern Company provided with automatic couplers and air brakes—a

very rapid introduction of these two devices. I can say that we are thoroughly satisfied that the M. C. B. standard vertical plane coupler is a success and we are fully satisfied with the device we are using. I have no authentic statistics as to the number of cars equipped with automatic couplers in the United States, but I am of the impression that the number will approximate about 15 per cent of the entire freight equipment. It can therefore be seen that a very considerable progress has been made in this direction in view of the fact that it covers only about three years general application.

I know from present knowledge that almost all of the large railroad companies of this country are applying automatic couplers to all new equipment, and any legislation that would disturb the existing condition of things in respect to the M. C. B. standard coupler would, to my mind, be exceedingly disastrous to the object to be attained, as it would render *questionable and* uncertain the work that is now being done, and in addition thereto would undo practically the work of the best mechanical minds of the country covering the period of the past five years.

This is, in brief, our position in the matter, and I trust that it will furnish you the information that you desire.

Yours, truly,

J. M. WHITMAN,
General Manager.

Mr. L. S. COFFIN,
Washington, D. C.

Permit me now to trespass for a little on your patience to discuss, very briefly, this brake question.

Many contend that a bill requiring " power " or " train " brakes—for they mean one and the same thing—is more necessary and important than one requiring automatic couplers. As a matter of fact, there are nearly twice as many men killed yearly from being required to use hand brakes on freight than are killed from handling couplers, but there are not so many injured. The casualties are more fatal.

Statistics from the Interstate Commerce Commission reports show that 557 were killed from falling from trains and 2,348 injured in the year ending June 30, 1890. These men receive their death and injuries from being obliged to be on top of freight trains to use hand brakes. When is added to this the great number of accidents resulting from collisions and running into open switches and obstructions which could have been avoided had cars been equipped with power brakes under the immediate control of the engineer the number would at least be swelled 50 per cent. The mere statement of this terrible fact, which no intelligent man will question, is all the argument that need be offered in favor of a law requiring that all interstate freight trains shall have enough cars in such trains equipped with power brakes so that the engineer can at all times control his train without requiring human beings to be at the cruel and inhuman exposure incident to the work of controlling trains by hand brakes.

This, too, when it is now admitted that if 20 to 30 per cent of the cars in a train are furnished with such power brakes that that train can be controlled easily and safely by the engineer, and at his instant wish.

I would call special attention to section 5 of the Henderson bill (H. R. 117, which is also in the printed report of my remarks of the hearing on March 2), which applies specially to this point. This provision should be incorporated in whatever bill the committee may see best to report, as it gives the railroad companies all the time they may need to fit up all their cars with power brakes, and still gives the employees immunity from exposure and danger, at a very early date. There are at the present time nearly, if not quite, 20 per cent of the freight cars already equipped with power brakes, and a

law requiring all trains run in interstate traffic to have in each train enough of these power-brake cars so as to give the control of the train into the power of the engineer, say two years from date, or say by the 1st day of January, 1894, would be the saving of at least 600 lives a year from that date and an amount of human suffering and grief simply beyond words to express.

This will not impose any unreasonable burden upon the roads. All admit—I mean the railroad officials—that it is only a question of time when every car will have a power brake. A law as stated will compel the roads to see to it that the cars now equipped shall be so distributed and switched up to the head end of the train so as to be utilized.

When the fact is patent beyond all question of doubt that with trains so managed these lives can be saved and this awful suffering prevented, can you gentlemen have any doubt about using your unquestioned prerogative in the behalf of these men?

In closing this discussion allow me to impress upon the committee that I do not stand here before you as merely one individual man—endeavoring to give you my own views and wishes—and leaving you to think that possibly I may have some mercenery ends of my own to accomplish. I stand here authorized to speak for not less than 90,000—mark the great hosts—90,000 men who are every day in the practical work of handling the cars that must be moved in the commerce of this great nation. These 90,000 men are in organized orders, so that their voice can come to you in no uncertain sound.

I lay before you the letter from the grand officers of the great and powerful order of the Brotherhood of Locomotive Engineers, some 30,000 in number, as shown in the report of the House Committee on Railroads and Canals, on this same matter, at the last Congress, which report I herewith submit and call attention, not only to this letter of the grand officers of the Brotherhood of Locomotive Engineers, but to the petition of Slatterly, Barnard, Lyons, and Hardie, and 9,678 others to the Interstate Commerce Commission on this matter. The resolution of the conference of State railroad commissions with the national commission; to the letter from the grand lodge officers of the Brotherhood of Railroad Trainmen; to the letter of Hon. Eugene V. Dete, grand secretary and treasurer of the Brotherhood of Locomotive Firemen; to the resolutions passed by Grand Division of the Order of Railroad Conductors at their annual meeting at Rochester; to the resolution passed by the National Association of Railway Surgeons; to the petition of over 10,000 practical railway brakemen in actual service, to the last Congress, all found on pages 2, 3, and 4 of this report.

Please bear in mind that while this great number of everyday railroad men are making or attempting to make their voices heard by Congress, asking for laws giving them a reasonable degree of safety in their employment—the benefit of which you and the whole public reap—I repeat, please remember there is still an equal if not larger number engaged in this same dangerous work who do not belong to these organizations, and who find it difficult to be represented here in any official and effective way because of this fact, a fact which exists in many cases and on many systems of road because of the expressed demand of officials to withdraw at once from these orders if any have joined them, on pain of summary dismissal from the service if they do not. I say, besides those thus organized there are at least 100,000

more of these trainmen who are looking to you for a law that will give them a chance to live.

While all these practical men, numbering in these orders and out of them in the aggregate some 200,000 men, may not all agree on all the specific provisions of legislation asked, there is an absolute unanimity of sentiment and prayer for "uniformity" in these matters of couplers and brakes. They are willing to leave to your superior wisdom how that uniformity shall be brought about.

The views expressed by me before you in these hearings on the wisdom of a law running in harmony with the line already so clearly defined and so successfully being followed by the majority of the roads, and my opposition to any legislation that looks to creating a commission to select any specific coupler to be legalized by Congress, are my own individual views. My own best judgment, based on a very extended and exhaustive investigation of this whole matter during eight years past, leads me to say to the committee that the provisions of the Henderson bill (H. R. 117) are better calculated to bring the relief to the railroad employees asked for by them quicker and more effectually than it can be secured by any of the other bills now before Congress.

Still, I am not at all strenuous for this particular bill. If the wisdom of the committee will evolve a better and wiser one, none will be more ready to accept it than myself.

But I can not close this already, to you, too tedious hearing without urging upon you haste in this matter, whatever legislation you may see proper to report to the Senate. This awful work of death and suffering must be more or less extended, at the best, for a few years. Time will be required to make the necessary changes. What I plead for is that the beginning of the ending of this sacrifice of human life shall commence with as little delay as possible.

Bear this in mind, Senators, that the absolute and stern facts are that from unquestioned data we know that an average of three of our fellows in the very prime of life must daily yield up life, and not less than thirty more must be made to suffer untold pain and loss of limb every day while you are deliberating upon what is the proper way to stop it—for stop it you can by proper legislation. The responsibility is now with you. The prayers and supplications of tens of thousands of wives and mothers, whose husbands and sons are earning them their daily bread in this necessary and honorable but dangerous work, go up to God that you may act wisely and quickly.

Beyond all question, the lives and safety from maiming and crippling yearly of not less than 12,000 of these faithful and brave men are in your hands. There is no way to stop this fearful work save by an act of Congress.

Aside from the death and suffering that can be prevented, is it not in place to ask of statesmen like yourselves, What of the economic question of turning out great armies of crippled men every year with such physical disabilities as to prohibit the possibility of being producers?

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39 Fed 701

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JAMES H. McKENNEY,
Clerk.

SAFETY APPLIANCE ACT.

AUTOMATIC COUPLERS.

DECISION OF UNITED STATES CIRCUIT COURT OF APPEALS.

JOHNSON v. SOUTHERN PACIFIC CO.

(Circuit court of appeals, eighth circuit. August 28, 1902. No. 1722.)

[Reprinted from the Federal Reporter, vol. 117, p. 462, by permission of the West Publishing Company.]

1. AUTOMATIC COUPLERS—ACT OF MARCH 2, 1893, DOES NOT REQUIRE LOCOMOTIVES TO BE EQUIPPED WITH.

   The act of March 2, 1893 (27 Stat., c. 196, p. 531), does not make it unlawful for common carriers to use locomotives engaged in interstate commerce which are not equipped with automatic couplers.

2. CONSTRUCTION OF STATUTES—ACT CHANGING COMMON LAW STRICTLY CONSTRUED.

   A statute changing the common law modifies or abrogates it no further than the clear import of its language necessarily requires.

3. SAME—PENAL STATUTE STRICTLY CONSTRUED.

   A penal statute may not be so broadened by construction as to make it cover, and authorize the punishment of, otherwise lawful acts, which are not denounced by the usual meaning of its express terms.

4. SAME—ENUMERATION OF SUBJECTS EXCLUDES OTHERS.

   A statute which enumerates the parties, things, or acts which it denounces thereby impliedly excludes all others from its effect.

5. SAME—WHEN NOT PERMISSIBLE.

   When the language of a statute is unambiguous, and its meaning is plain, it must be held to mean, and the legislative body must be held to have intended, what it plainly expresses, and no room is left for construction.

6. INJURY TO SERVANT—NEGLIGENCE—ASSUMPTION OF RISK.

   A servant assumes the ordinary risks and dangers of the employment upon which he enters, so far as they are known to him and so far as they would have been known to one of his experience, age, and capacity by the use of ordinary care.

7. SAME—ASSUMPTION OF RISK OF COUPLING CARS WITH DIFFERENT COUPLERS.

   A brakeman of ordinary intelligence and experience assumes the risks and dangers of coupling cars provided with different kinds of well-known couplers, bumpers, and deadwoods, because these are the ordinary risks and dangers of his service.

"6. See Master and Servant, vol. 34, Cent. Dig., sec. 55[illegible].

8. Same—Automatic Couplers—Act of March 2, 1893—Equipment of Car with One Kind of Coupler Sufficient.

The equipment, under the act of March 2, 1893, of a car with automatic couplers which will couple automatically with those of the same kind of make, is a compliance with the statute. It does not require cars used in interstate commerce to be equipped with couplers which will couple automatically with cars equipped with automatic couplers of other makes.

9. Same—When Car is Used in Moving Interstate Traffic.

Cars loaded with articles shipped to other States, and started, whether in yards, on side tracks, or in trains, are used in moving interstate traffic. But vacant cars in yards, on side tracks, in repair shops, or in trains which are not loaded with, or in use to move articles of, interstate commerce, do not fall within the terms or meaning of the act of March 2, 1893. A dining car standing empty on a side track at an intermediate station, where it had been left by a train engaged in interstate traffic until it should be taken by another train engaged in the same traffic, going in the opposite direction, and which the owner intended to use in interstate traffic, was drawn by a freight engine from the side track to the turntable, turned, and placed again upon the side track. *Held*, that the car was not used in moving interstate traffic while it was on the side track and while it was being turned.

Thayer, J., dissenting in part.

(Syllabus by the court.)

In error to the circuit court of the United States for the district of Utah.

This is an action for damages for a personal injury, in which the court instructed the jury to return a verdict for the defendant upon this state of facts: The defendant was operating passenger trains between San Francisco, in the State of California, and Ogden, in the State of Utah. It was in the habit of drawing a dining car in these trains. Such a car formed a part of a train leaving San Francisco, and ran through to Ogden, where it was ordinarily turned and put into a train going west to San Francisco. On August 5, 1900, the east-bound train was so late that it was not practicable to get the dining car into Ogden in time to place it in the next west-bound train, and it was therefore left on a side track at Promontory, in the State of Utah, to be picked up by the west-bound train when it arrived. While it was standing on this track the conductor of a freight train which arrived there was directed to take this dining car to a turntable, turn it, and place it back upon the side track, so that it would be ready to return to San Francisco. The conductor instructed his crew to carry out this direction. The plaintiff, Johnson, was the head brakeman, and he undertook to couple the engine to the dining car for the purpose of carrying out the order of the conductor. The freight engine was equipped with a Janney coupler, which would couple automatically with another Janney coupler, and the dining car was provided with a Miller hook or Miller coupler, which would couple automatically with another Miller hook; but the Miller hook would not couple automatically with the Janney coupler, because it was on the same side, and would pass over it. Johnson knew this, and undertook to make the coupling by means of a link and pin. He knew that it was a difficult coupling to make, and that it was necessary to go between the engine and the car to accomplish it, and that it was dangerous to do so. Nevertheless he went in between the engine and the car, and tried to make the coupling three times, without objection or protest. He failed twice, and the third time his hand was caught and crushed so that it became necessary to amputate his arm above the wrist.

W. L. Maginnis, for plaintiff in error.

Henry G. Herbel (*Martin L. Clardy*, on the brief), for defendant in error.

Before SANBORN and THAYER, *Circuit Judges*, and LOCHREN, *District Judge*.

SANBORN, *Circuit Judge*, after stating the case as above, delivered the opinion of the court:

Under the common law the plaintiff assumed the risks and dangers of the coupling which he endeavored to make, and for that reason he is estopped from recovering the damages which resulted from his undertaking. He was an intelligent and experienced brakeman, familiar with the couplers he sought to join, and with their condition, and well aware of the difficulty and danger of his undertaking, so that he falls far within the familiar rules that the servant assumes the ordinary risks and dangers of the employment upon which he enters, so far as they are known to him, and so far as they would have been known to one of his age, experience, and capacity, by the use of ordinary care, and that the risks and dangers of coupling cars provided with different kinds of well-known couplers, bumpers, brakeheads, and deadwoods are the ordinary risks and dangers of a brakeman's service. (*Manufacturing Co.* v. *Erickson*, 55 Fed., 943, 946, 5 C. C. A., 341, 343; *Railroad Co.* v. *Blake*, 27 U. S. App., 190, 194, 11 C. C. A., 93, 95, 63 Fed., 45, 47; *King* v. *Morgan*, 48 C. C. A., 507, 511, 109 Fed., 446, 450; *Gold Mines* v. *Hopkins*, 111 Fed., 298, 304, 49 C. C. A., 347, 353; *Railroad Co.* v. *McDade*, 135 U. S., 554, 570, 10 Sup. Ct., 1044, 34 L. Ed., 235; *Railroad Co.* v. *Seley*, 152 U. S., 145, 152, 14 Sup. Ct., 530, 38 L. Ed., 391; *Kohn* v. *McNulta*, 147 U. S., 238, 241, 13 Sup. Ct., 298, 37 L. Ed., 150; *Railroad Co.* v. *Voight*, 176 U. S., 498, 120 Sup. Ct., 385, 44 L. Ed., 560; *Sweeney* v. *Envelope Co.*, 101 N. Y., 520, 5 N. E., 358, 54 Am. St. Rep., 722; *Railway Co.* v. *Smithson*, 45 Mich., 212, 7 N. W., 791; *Hodges* v. *Kimball*, 44 C. C. A., 193, 104 Fed., 745; *Whitcomb* v. *Oil Co.* (Ind. Sup.), 55 N. E., 440, 442; *Boland* v. *Railroad Co.*, Ala., 18 South., 99.)

This proposition is not seriously challenged, but counsel base their claim for a reversal of the judgment below upon the position that the plaintiff was relieved of this assumption of risk and of its consequences by the provisions of the act of Congress of March 2, 1893 (27 Stat., c. 196, p. 531). The title of that act and the parts of it that are material to the consideration of this contention are these:

AN ACT to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving wheel brakes, and for other purposes.

SECTION 1. That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power-driving wheel brake and appliances for operating the train brake system. * * *

SEC. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with

couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars. * * *

SEC. 6. That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act shall be liable to a penalty of one hundred dollars for each and every such violation. * * *

SEC. 8. That any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provisions of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge.

The first thought that suggests itself to the mind upon a perusal of this law, and a comparison of it with the facts of this case, is that this statute has no application here, because both the dining car and the engine were equipped as this act directs. The car was equipped with Miller couplers which would couple automatically with couplers of the same construction upon cars in the train in which it was used to carry on interstate commerce, and the engine was equipped with a power driving wheel brake such as this statute prescribes. To overcome this difficulty, counsel for the plaintiff persuasively argues that this is a remedial statute; that laws for the prevention of fraud, the suppression of a public wrong, and the bestowal of a public good are remedial in their nature and should be liberally construed to prevent the mischief and to advance the remedy, notwithstanding the fact that they may impose a penalty for their violation; and that this statute should be so construed as to forbid the use of a locomotive as well as a car which is not equipped with an automatic coupler. In support of this contention he cites *Suth. St. Const.*, sec. 360; *Wall* v. *Platt*, 169 Mass., 398, 48 N. E., 270; *Taylor* v. *U. S.*, 3 How., 197, 11 L. Ed., 559 and other cases of like character. The general propositions which counsel quote may be found in the opinions in these cases, and in some of them they were applied to the particular facts which those actions presented. But the interpolation in this act of Congress, by construction, of an ex post facto provision that it is, and ever since January 1, 1898, has been, unlawful for any common carrier to use any engine in interstate traffic that is or was not equipped with couplers coupling automatically, and that any carrier that has used or shall use an engine not so equipped has been and shall be liable to a penalty of $100 for every violation of this provision, is too abhorrent to the sense of justice and fairness, too rank and radical a piece of judicial legislation, and in violation of too many established and salutary rules of construction, to commend itself to the judicial reason or conscience. The primary rule for the interpretation of a statute or a contract is to ascertain, if possible, and enforce the intention which the legislative body that enacted the law, or the parties who made the agreement, have expressed therein. But it is the intention expressed in the law or contract, and that only, that the courts may give effect to. They can

not lawfully assume or presume secret purposes that are not indicated or expressed by the statute itself and then enact provisions to accomplish these supposed intentions. While ambiguous terms and doubtful expressions may be interpreted to carry out the intention of a legislative body which a statute fairly evidences, a secret intention can not be interpreted into a statute which is plain and unambiguous, and which does not express it. The legal presumption is that the legislative body expressed its intention, that it intended what it expressed, and that it intended nothing more. (*U. S.* v. *Wiltberger*, 5 Wheat., 76, 5 L. Ed., 37; *Insurance Co.* v. *Champlin*, C. C. A., 116 Fed., 858; *Cold Blast Trans. Co.* v. *Kansas City Bolt and Nut Co.*, C. C. A., 114 Fed., 77, 81; *Railway Co.* v. *Bagley*, 60 Kan., 424, 431, 56 Pac., 759; *Woolsey* v. *Ryan*, 59 Kan., 601, 54 Pac., 664; *Davie* v. *Mining Co.*, 93 Mich., 491, 53 N. W., 625, 24 L. R. A., 357; *Vogel* v. *Pekoc*, 157 Ill., 339, 42 N. E., 386, 30 L. R. A., 491; *Campbell* v. *Lambert*, 36 La. Ann., 35, 51 Am. Rep., 1; *Turnpike Co.* v. *Coy*, 13 Ohio St., 84; *Stensgaard* v. *Smith*, 43 Minn., 11, 44 N. W., 669, 19 Am. St. Rep., 205.) Construction and interpretation have no place or office where the terms of a statute are clear and certain, and its meaning is plain. In such a case they serve only to create doubt and to confuse the judgment. When the language of a statute is unambiguous, and its meaning evident, it must be held to mean what it plainly expresses, and no room is left for construction. (*Swarts* v. *Siegel*, C. C. A., 117 Fed., 13; *Knox Co.* v. *Morton*, 15 C. C. A., 671, 673, 68 Fed., 787, 789; *Railway Co.* v. *Sage*, 17 C. C. A., 558, 565, 71 Fed., 40, 47; *U. S.* v. *Fisher*, 2 Cranch, 358, 399, 2 L. Ed., 304; *Railway Co.* v. *Phelps*, 137 U. S., 528, 536, 11 Sup. Ct., 168, 24 L. Ed., 767.)

This statute clearly prohibits the use of any engine in moving interstate commerce not equipped with a power driving-wheel brake, and the use of any car not equipped with automatic couplers, under a penalty of $100 for each offense; and it just as plainly omits to forbid, under that or any penalty, the use of any car which is not equipped with a power driving-wheel brake, and the use of any engine that is not equipped with automatic couplers. This striking omission to express any intention to prohibit the use of engines unequipped with automatic couplers raises the legal presumption that no such intention existed, and prohibits the courts from importing such a purpose into the act, and enacting provisions to give it effect. The familiar rule that the expression of one thing is the exclusion of others points to the same conclusion. Section 2 of the act does not declare that it shall be unlawful to use any engine or car not equipped with automatic couplers, but that it shall be unlawful only to use any car lacking this equipment. This clear and concise definition of the unlawful act is a cogent and persuasive argument against the contention that the use without couplers of locomotives, hand cars, or other means of conducting

interstate traffic, was made a misdemeanor by this act. Where the statute enumerates the persons, things, or acts affected by it there is an implied exclusion of all others. (*Suth. St. Const.*, sec. 227.) And when the title of this statute and its first section are again read; when it is perceived that it was not from inattention, thoughtlessness, or forgetfulness; that it was not because locomotives were overlooked or out of mind, but that it was advisedly and after careful consideration of the equipment which they should have, that Congress forbade the use of cars alone without automatic couplers; when it is seen that the title of the act is to compel common carriers to "equip their cars with automatic couplers * * * and their locomotives with driving-wheel brakes;" that the first section makes it unlawful to use locomotives not equipped with such brakes, and the second section declares it to be illegal to use cars without automatic couplers—the argument becomes unanswerable and conclusive.

Again, this act of Congress changes the common law. Before its enactment, servants coupling cars used in interstate commerce without automatic couplers assumed the risk and danger of that employment, and carriers were not liable for injuries which their employees suffered in the discharge of this duty. Since its passage the employees no longer assume this risk, and, if they are free from contributory negligence, they may recover for the damages they sustain in this work. A statute which thus changes the common law must be strictly construed. The common or the general law is not further abrogated by such a statute than the clear import of its language necessarily requires. (*Shaw* v. *Railroad Co.*, 101 U. S., 557, 565, 25 L. Ed., 892; *Fitzgerald* v. *Quann*, 109 N. Y., 441, 445, 17 N. E., 354; *Brown* v. *Barry*, 3 Dall., 365, 367, 1 L. Ed., 638.) The language of this statute does not require the abrogation of the common law that the servant assumes the risk of coupling a locomotive without automatic couplers with a car which is provided with them.

Moreover, this is a penal statute, and it may not be so broadened by judicial construction as to make it cover and permit the punishment of an act which is not denounced by the fair import of its terms. The acts which this statute declares to be unlawful, and for the commission of which it imposes a penalty, were lawful before its enactment, and their performance subjected to no penalty or liability. It makes that unlawful which was lawful before its passage, and it imposes a penalty for its performance. Nor is this penalty a mere forfeiture for the benefit of the party aggrieved or injured. It is a penalty prescribed by the statute and recoverable by the Government. It is, therefore, under every definition of the term a penal statute. The act which lies at the foundation of this suit—the use of a locomotive which was not equipped with a Miller hook to turn a car which was duly equipped with automatic couplers—was, therefore,

unlawful or lawful as it was or was not forbidden by this statute. That act has been done. When it was done it was neither forbidden nor declared to be unlawful by the express terms of this law. There is no language in it which makes it unlawful to use in interstate commerce a locomotive engine which is not equipped with automatic couplers. The argument of counsel for the plaintiff is, however, that the statute should be construed to make this act unlawful because it falls within the mischief which Congress was seeking to remedy, and hence it should be presumed that the legislative body intended to denounce this act as much as that which it forebade by the terms of the law. An ex post facto statute which would make such an innocent act a crime would be violative of the basic principles of Anglo-Saxon jurisprudence. An ex post facto construction which has the same effect is equally abhorrent to the sense of justice and of reason. The mischief at which a statute was leveled, and the fact that other acts which it does not denounce are within the mischief, and of equal atrocity with those which it forbids, do not raise the presumption that the legislative body which enacted it had the intention, which the law does not express, to prohibit the performance of the acts which it does not forbid. Nor will they warrant a construction which imports into the statute such a prohibition. The intention of the legislature and the meaning of a penal statute must be found in the language actually used, interpreted according to its fair and usual meaning, and not in the evils which it was intended to remedy, nor in the assumed secret intention of the lawmakers to accomplish that which they did not express. (*U. S.* v. *Wiltberger*, 5 Wheat., 76; 5 L. Ed., 37; *Sarlls* v. *U. S.*, 152 U. S., 570; 14 Sup. Ct., 720; 38 L. Ed., 556; *U. S.* v. *Harris*, 177 U. S., 305, 309; 20 Sup. Ct., 609; 44. L. Ed., 780; *Suth. St. Const.*, sec. 208.) The decision and opinion of the Supreme Court in *U. S.* v. *Harris* (177 U. S., 305, 309; 20 Sup. Ct., 609; 44 L. Ed., 780) is persuasive—nay, it is decisive—in the case before us. The question there presented was analogous to that here in issue. It was whether Congress intended to include receivers managing a railroad among those who were prohibited from confining cattle, sheep, and other animals in cars more than twenty-eight consecutive hours without unloading them for rest, water, and feeding, under "An act to prevent cruelty to animals while in transit by railroad or other means of transportation," approved March 3, 1873, and published in the Revised Statutes as sections 4386, 4387, 4388, and 4389. This statute forbids the confinement of stock in cars by any railroad company engaged in interstate commerce more than twenty-eight consecutive hours, and prescribes a penalty of $500 for a violation of its provisions. The plain purpose of the act was to prohibit the confinement of stock while in transit for an unreasonable length of time. The confinement of cattle by receivers operating a railroad was as

injurious as their confinement by a railroad company, and the argument for the United States was that, as such acts committed by receivers were plainly within the mischief Congress was seeking to remedy, the conclusion should be that it intended to prohibit receivers, as well as railroad companies, from the commission of the forbidden acts, and hence that receivers were subject to the provisions of the law. The Supreme Court conceded that the confinement of stock in transit was within the mischief that Congress sought to remedy. But it held that as the act did not by its terms forbid such acts when committed by receivers, it could not presume the intention of Congress to do so, and import such a provision into the plain terms of the law. Mr. Justice Shiras, who delivered the unanimous opinion of the court, said:

> Giving all proper force to the contention of the counsel for the Government, that there has been some relaxation on the part of the courts in applying the rule of strict construction to such statutes, it still remains that the intention of a penal statute must be found in the language actually used, interpreted according to its fair and obvious meaning. It is not permitted to courts, in this class of cases, to attribute inadvertence or oversight to the legislature when enumerating the classes of persons who are subjected to a penal enactment, nor to depart from the settled meaning of words or phrases in order to bring persons not named or distinctly described within the snpposed purpose of the statute.

He cited with approval the decision of the Supreme Court in *Sarlls* v. *U. S.* (152 U. S., 570, 575; 14 Sup. Ct., 720; 38 L. Ed., 556), to the effect that lager beer was not included within the meaning of the term "spirituous liquors" in the penal statute found in section 2139 of the Revised Statutes, and closed the discussion with the following quotation from the opinion of Chief Justice Marshall in *U. S.* v. *Wiltberger* (5 Wheat., 76; 5 L. Ed., 37):

> The rule that penal statutes are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislative, and not in the judicial, department. It is the legislature, not the court, which is to define a crime and ordain its punishment. It is said that, notwithstanding this rule, the intention of the lawmaker must govern in the construction of penal as well as other statutes. But this is not a new, independent rule, which subverts the old. It is a modification of the ancient maxim, and amounts to this: That, though penal statutes are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be applied so as to narrow the words of the statute, to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature ordinarily used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of words—especially in a penal act—in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute is within its provisions,

so far as to punish a crime not enumerated in the statute, because it is of equal atrocity or of a kindred character with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule in other cases.

The act of March 2, 1893, is a penal statute, and it changes the common law. It makes that unlawful which was innocent before its enactment, and imposes a penalty, recoverable by the Government. Its terms are plain and free from doubt, and its meaning is clear. It declares that it is unlawful for a common carrier to use in interstate commerce a car which is not equipped with automatic couplers, and it omits to declare that it is illegal for a common carrier to use a locomotive that is not so equipped. As Congress expressed in this statute no intention to forbid the use of locomotives which were not provided with automatic couplers, the legal presumption is that it had no such intention, and provisions to import such an intention into the law and to effectuate it may not be lawfully enacted by judicial construction. The statute does not make it unlawful to use locomotives that are not equipped with automatic couplers in interstate commerce, and it did not modify the rule of the common law under which the plaintiff assumed the known risk of coupling such an engine to the dining car.

There are other considerations which lead to the same result. If we are in error in the conclusion already expressed, and if the word "car," in the second section of this statute, means locomotive, still this case does not fall under the law, (1) because both the locomotive and the dining car were equipped with automatic couplers; and (2) because at the time of the accident they were not "used in moving interstate traffic."

For the reasons which have been stated, this statute may not be lawfully extended by judicial construction beyond the fair meaning of its language. There is nothing in it which requires a common carrier engaged in interstate commerce to have every car on its railroad equipped with the same kind of coupling, or which requires it to have every car equipped with a coupler which will couple automatically with every other coupler with which it may be brought into contact in the usual course of business upon a great transcontinental system of railroads. If the lawmakers had intended to require such an equipment it would have been easy for them to have said so, and the fact that they made no such requirement raises the legal presumption that they intended to make none. Nor is the reason for their omission to do so far to seek or difficult to perceive. There are several kinds or makes of practical and efficient automatic couplers. Some railroad companies use one kind; others have adopted other kinds. Couplers of each kind will couple automatically with others

of the same kind or construction. But some couplers will not couple automatically with couplers of different construction. Railroad companies engaged in interstate commerce are required to haul over their roads cars equipped with all these couplers. They can not relieve themselves from this obligation or renounce this public duty for the simple reason that their cars or locomotives are not equipped with automatic couplers which will couple with those with which the cars of other roads are provided, and which will couple with equal facility with those of their kind. These facts and this situation were patent to the Congress when it enacted this statute. It must have known the impracticability of providing every car with as many different couplers as it might meet upon a great system of railroads, and it made no such requirement. It doubtless knew the monopoly it would create by requiring every railroad company to use the same coupler, and it did not create this monopoly. The prohibition of the statute goes no farther than to bar the handling of a car "not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the car." It does not bar the handling and use of a car which will couple automatically with couplers of its kind because it will not also couple automatically with couplers of all kinds, and it would be an unwarrantable extension of the terms of this law to import into it a provision to this effect. A car equipped with practical and efficient automatic couplers, such as the Janney couplers or the Miller hooks, which will couple automatically with those of their kind, fully and literally complies with the terms of the law, although these couplers will not couple automatically with automatic couplers of all kinds or constructions. The dining car and the locomotive were both so equipped. Each was provided with an automatic coupler which would couple with those of its kind, as provided by the statute, although they would not couple with each other. Each was accordingly equipped as the statute directs, and the defendant was guilty of no violation of it by their use.

Again, the statute declares it to be unlawful for a carrier "to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped," etc. It is not, then, unlawful, under this statute, for a carrier to haul a car not so equipped which is either used in interstate traffic solely, or which is not used in any traffic at all. It would be no violation of the statute for a carrier to haul an empty car not used to move any interstate traffic from one end of its railroad to the other. It would be no violation of the law for it to haul such a car in its yards, on its side track, to put it into its trains, to move it in any manner it chose. It is only when a car is "used in moving interstate traffic" that it becomes unlawful to haul it unless it is equipped as the statute prescribes. On the day of this accident the dining car in this case was standing empty on the side track. The

defendant drew it to a turntable, turned it, and placed it back upon the side track. The accident occurred during the performance of this act. The car was vacant when it went to the turntable, and vacant when it returned. It moved no traffic on its way. How could it be said to have been "used in moving interstate traffic" either while it was standing on the side track or while it was going to and returning from the turntable? If the defendant had drawn it vacant over every foot of its railroad, it would not have been engaged in moving interstate traffic, and it would not have fallen under the ban of the statute. How can it thus fall because it was moved in the same way over a small portion of the road? The argument of counsel for the plaintiff is that because it had been used in moving interstate traffic on its way from San Francisco to Promontory, and because it was the intention of the defendant to put it to the same use in a few hours, when a west-bound train arrived, it was impressed with the use of moving such traffic in the interim. But this statute must be read not only in the light of the rules of construction to which we have adverted in the earlier part of this opinion, but also in view of the limitations upon the power of Congress in this respect. It is by virtue of the power granted to Congress to "regulate commerce among the States," and by virtue of that authority alone, that this statute was enacted and has efficacy. Congress had neither the authority nor the purpose to interfere with or to touch by this act anything except commerce among the States. Is the turning of a vacant car which its owner intends to use at some future time in moving interstate traffic any part of commerce among the States? Does the intention of the owner as to a future use of an implement of transportation affect the character of the act of turning this car? If the defendant had intended to use this dining car for traffic within the State of Utah only, if it had intended to send it to the shop to be destroyed or repaired, or if, after the car was turned, it had changed its intention and concluded that it would not use it to move interstate traffic, would any of these intentions or this change of purpose have affected the act of turning the car, and have impressed it with a use in interstate commerce or intrastate commerce? The only answer to these questions is a negative one, and, if this be true, then the intention of the defendant to use this car at some future time in interstate commerce would not make the act of turning it a part of such commerce, nor bring it under the ban of the act of March 2, 1893. The opinion and decision of the Supreme Court in *Coe* v. *Town of Errol* (116 U. S., 517, 525, 526; 6 Sup. Ct., 475; 29 L. Ed., 715) lend strong support to this view. In that case the owners of logs were cutting and transporting them for the purpose of exporting them from New Hampshire to Maine. The logs had been cut, drawn to and deposited in and on the banks of Clear Stream, to be floated down

that stream and down the Androscoggin River to the State of Maine, and the owners intended to transport them in this way to that State. They were lying in the town of Errol, awaiting water sufficient to float them down the stream. The Supreme Court held that they had not yet become subjects of interstate commerce; that they would not become such until they were "committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State;" and that the fact that their owners intended to export them could not change their situation, because the owners might change their intention. If commodities do not become articles of interstate commerce until they start on their final passage to another State, cars and engines can not be "used in moving interstate traffic" until they receive articles of interstate traffic, or start to carry them from one State to another, and the act of turning a vacant car at an intermediate station can not be the use of that car in moving such traffic. This is the effect of the decision of the supreme court of appeals of Virginia in *Norfolk and W. R. Co.* v. *Com.* (24 S. E., 838; 34 L. R. A., 105; 57 Am. St. Rep., 827). That court held in that case, upon the authority of *Coe* v. *Errol*, that a train of empty coal cars on its way to procure a load of coal which the carrier intended to transport with these cars from one State to another was not engaged in interstate commerce, and would not be until it was loaded with the articles of such commerce, to be carried to another State or started on the way. Speaking of the effect of the intention of the carrier to use the cars in moving interstate traffic, that court said:

> The common carrier has the same right to change his mind, and ship on other cars than those which he may have provided for that purpose, and the cars which were intended for that purpose may never be used. The rule fixed by the Supreme Court in the one case seems equally applicable to the other. (*U. S.* v. *Boyer*, D. C., 85 Fed., 425, 432; *Kelley* v. *Rhoads*, Wyo., 63 Pac., 935.)

The power of Congress over this subject was limited to the regulation of commerce among the States. It intended to exercise that power, but not to transgress its bounds. It prohibited the hauling of cars used in moving interstate traffic unless equipped as the act directs. The intention to use cars for that purpose does not constitute such a use, because that intention may change. (*Coe* v. *Town of Errol*, 116 U. S., 526; 6 Sup. Ct., 475; 29 L. Ed., 715; *Norfolk and W. R. Co.* v. *Com.*, Va., 24 S. E., 838; 34 L. R. A., 105; 57 Am. St. Rep., 827.) The fact that such cars have been or will be so used does not constitute their use in moving interstate traffic, because the prohibition is not of the hauling of cars that have been or will be used in such traffic, but only of those used in moving that traffic. Cars loaded with articles of interstate commerce, and started toward their ultimate destination, whether in trains, in yards, or on side tracks, may well be

held to come within the terms of this statute and the intent of Congress. But vacant cars which are not and may never be so used can not be held to come within the fair import of the terms of this law either because their owner intends to use them for that purpose at some future time or because they have been or will be so used. Empty cars in repair shops, in yards, on side tracks, those in use to transport traffic within a State, and for that purpose alone, are not in use to move articles of interstate commerce, and do not fall under the ban of this law. Neither the empty dining car standing upon the side track nor the freight engine which was used to turn it at the little station in Utah was then used in moving interstate traffic, within the meaning of this statute, and this case did not fall within the provisions of this law.

The judgment below must accordingly be affirmed, and it is so ordered.

THAYER, *Circuit Judge:*

I am unable to concur in the conclusion announced by the majority of the court, that the act of Congress of March 2, 1893 (27 Stat., 531, c. 196), does not require locomotive engines to be equipped with automatic couplers; and I am equally unable to concur in the other conclusion announced by my associates that the dining car in question at the time of the accident was not engaged or being used in moving interstate traffic.

In my judgment, it is a very technical interpretation of the provisions of the act in question, and one which is neither in accord with its spirit nor with the obvious purpose of the lawmaker, to say that Congress did not intend to require engines to be equipped with automatic couplers. The statute is remedial in its nature; it was passed for the protection of human life; and there was certainly as much, if not greater, need that engines should be equipped to couple automatically, as that ordinary cars should be so equipped, since engines have occasion to make couplings more frequently. In my opinion, the true view is that engines are included by the words "any car," as used in the second section of the act. The word "car" is generic, and may well be held to comprehend a locomotive or any other similar vehicle which moves on wheels; and especially should it be so held in a case like the one now in hand, where no satisfactory reason has been assigned or can be given which would probably have influenced Congress to permit locomotives to be used without automatic coupling appliances.

I am also of opinion that, within the fair intent and import of the act, the dining car in question at the time of the accident was being hauled or used in interstate traffic. The reasoning by which a contrary conclusion is reached seems to me to be altogether too refined

and unsatisfactory to be of any practical value. It was a car which at the time was employed in no other service than to furnish meals to passengers between Ogden and San Francisco. It had not been taken out of that service, even for repairs or for any other use, when the accident occurred, but was engaged therein to the same extent that it would have been if it had been hauled through to Ogden, and if the accident had there occurred while it was being turned to make the return trip to San Francisco. The cars composing a train which is regularly employed in interstate traffic ought to be regarded as used in that traffic while the train is being made up with a view to an immediate departure on an interstate journey as well as after the journey has actually begun. I accordingly dissent from the conclusion of the majority of the court on this point.

While I dissent on the foregoing propositions, I concur in the other view which is expressed in the opinion of the majority, to the effect that the case discloses no substantial violation of the provisions of the act of Congress, because both the engine and the dining car were equipped with automatic coupling appliances. In this respect the case discloses a compliance with the law, and the ordinary rule governing the liability of the defendant company should be applied. The difficulty was that the car and engine were equipped with couplers of a different pattern, which would not couple, for that reason, without a link. Jenney couplers and Miller couplers are in common use on the leading railroads of the country, and Congress did not see fit to command the use of either style of automatic coupler to the exclusion of the other, while it must have foreseen that, owing to the manner in which cars were ordinarily handled and exchanged, it would sometimes happen, as in the case at bar, that cars having different styles of automatic couplers would necessarily be brought in contact in the same train. It made no express provision for such an emergency, but declared generally that, after a certain date, cars should be provided with couplers coupling automatically. The engine and dining car were so equipped in the present instance, and there was no such violation of the provisions of the statute as should render the defendant company liable to the plaintiff by virtue of the provisions contained in the eighth section of the act. In other words, the plaintiff assumed the risk of making the coupling in the course of which he sustained the injury. On this ground I concur in the order affirming the judgment below.

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DEFECTIVE SAFETY APPLIANCES.

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of March 2, 1893,
And State Statutes of a Similar Nature.

WASHINGTON:
GOVERNMENT PRINTING OFFICE

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DEFECTIVE SAFETY APPLIANCES.

HARRY BRYCE v. THE BURLINGTON, CEDAR RAPIDS AND NORTHERN RAILWAY COMPANY.

[119 Iowa Rpts. 274.]

1. Personal Injury—Engine Coupler—Assumption of Risk—Statutes Construed—Instructions.

Code sections 2079–2082, when construed as a whole, do not require that engines be equipped with automatic couplers, and an employee injured by the negligence of the company in using an old-style coupler for the engine is not within the provisions of Code, section 2083, relating to the assumption of risk. As there was evidence tending to support the claim that plaintiff assumed the risk, failure to instruct the jury in relation thereto, and that automatic couplers are not required to be attached to engines, was prejudicial error.

2. Same—New Appliances—Evidence of.

Failure to equip engines with the latest coupling devices is not per se negligence, but where such appliances are shown to be practical and safe their general use may be taken into consideration by the jury in determining the question of negligence in using older and different appliances.

Appeal from Cedar Rapids Superior Court. Hon. J. H. Rothrock, Judge.

Thursday, January 29, 1903.

Action to recover for a personal injury. Judgment for the plaintiff. The defendant appeals. Reversed.

S. K. Tracy and *Carroll Wright* for appellant.

Rickel, Cracker & Tourtellot for appellee.

Sherwin, *J.:*

The petition is in two counts, one declaring that the defendant was negligent as a matter of law because it had not equipped its switch engine with automatic couplers, and the other averring that the coupler on the engine was old, antiquated, and defective. The answer raised an issue as to both counts, and further alleged as to the second that the plaintiff had assumed the risk incident to the use of the antiquated and defective coupler. The trial court did not construe the automatic coupler statute or instruct the jury in relation thereto, but submitted the case on the general question of negligence, and without any instructions on the question of the assumption of risk. It becomes necessary, therefore, to construe this statute for the purpose of determining whether the court erred in failing to so instruct. The statute

in force at the time the plaintiff received the injury complained of—August 11, 1900—was first enacted by the Twenty-third General Assembly (chap. 18), which was substantially reenacted in sections 2079, 2080, 2081, and 2082 of the Code, which read as follows:

2079. No corporation, company, or person operating any line of railroad within this State * * * shall put in use any new car or any old one that has been in the shop for general repairs to one or both of its drawbars that is not equipped with automatic couplers, so constructed as to enable any person to couple or uncouple them without going between them.

2080. After January 1, 1898, no corporation, company, or person operating a railway line shall have upon any railroad in this State any car that is not equipped with such safety automatic coupler.

2081. No corporation, company, or person operating any line of railroad in this State shall use any locomotive engine upon any railroad or in any railroad yard in the State that is not equipped with a proper and efficient power brake, commonly called a "driver brake."

2082. No corporation, company, or person operating a line of railroad in the State shall run any train of cars that shall not have therein a sufficient number of cars with some kind of efficient automatic power brake to enable the engineer to control the train without requiring brakemen to go between the ends or on top of the cars to use the hand brake.

This statute must be construed in its entirety for the purpose of determining the legislative intent, and when so construed in the light of the common knowledge and experience of the legislators and the public in general, and construing the words and phrases used according to the context and the generally approved and accepted usage of the language, we think the legislative intent is clear and unambiguous. A railroad engine and its tender are one and inseperable, and while both may properly be classed as "cars" in the construction of some statutes, it does not necessarily follow that they should be so classed in the construction of all statutes regardless of the legislative intent. Thus, in *Railroad Co.* v. *O'Hara*, 150 Ill., 580 (37 N. E. Rep., 917), the court held that a railroad engine should be classed as a car in construing a city ordinance forbidding railroad companies running trains or cars through the city at a high rate of speed. This construction was manifestly correct, and any other would have done extreme violence to the intent and spirit of the ordinance.

In *Mayor, etc., of New York* v. *The Third Avenue R. Co.*, 117 N. Y., 404, 646 (22 N. E. Rep., 755), the court had under consideration a franchise granted the defendant on condition that it pay an "annual license fee for each car now allowed by law." At that time license fees were required by an existing ordinance for "each accommodation coach" or "stage coach," and it was held that a street car came within the meaning of the old ordinance by the very terms of the franchise, because the company was thereby bound to pay the annual fee then required, not one which should be thereafter imposed. So, in the case of *Railway Co.* v. *Manson*, 31 Kan., 337 (2 Pac. Rep., 800), in construing a

statute requiring "proper cattle guards," the court held that the term "cattle guard," as employed in this statute, meant one that would prevent "animals from going on the land adjoining the right of way," and that the statute was not complied with by digging a pit under the track.

Neither these nor the other cases along the same line cited by the appellee afford us any material assistance in construing our own statute, the very laudable purpose of which was to protect the employees of railroad companies from the extraordinary hazards incident to the handling of cars. Recurring again thereto, it is manifest that the word "cars," used in sections 2079, 2080, and 2082 were used alone advisedly, and for the purpose of distinguishing them from engines and their tenders, because section 2081 of this same act expressly provides for the equipment of all "engines" with a "proper and efficient power brake, commonly called a 'driver brake,'" and, if it had been the legislative intent to require engines to be equipped with automatic couplers in addition to the brake, it would have been so expressed in plain language.

At the time this statute was originally enacted no action had been taken by Congress requiring self-couplers and air brakes on all cars used in interstate commerce, and it was a matter of common knowledge that freight cars with all kinds of couplers and drawheads were in use on all of the railroads in the United States, and that cars belonging to the many different roads were widely scattered. Engines must be used in handling these foreign cars, and the increased danger and inconvenience of making a coupling where the engine or tender was automatically equipped, and the car to which it was to be coupled was not, was undoubtedly in the minds of the legislators. That the distinction which we pointed out was clearly made and intended is manifested further by the language of sections 5 and 6 of the original act.

Section 5 required railroad companies to "include in their annual report to the State railroad commissioners the number of locomotive engines and cars used in this State, and what number is equipped with automatic power brakes and what number of cars equipped with automatic safety couplers, and the kind of brakes and couplers used." Section 6 (2083 of the Code) provided that a railroad company "operating a railroad in this State and using a locomotive engine, or running a train of cars, or using any freight, way, or other car contrary to the provisions of the four preceding sections shall be guilty of a misdemeanor," the prohibited use of the engine clearly referring to the section requiring a power brake. The last section referred to provides that "any railway employee who may be injured by the running of such engine * * * contrary to the provisions of said sections shall not be considered as waiving his right to recover damages by continuing in the employ of the company;" hence, if the statute were

construed as contended for by the appellee, the question of the assumption of risk would be eliminated from the case. But we can not so construe it, and, as there was evidence tending to support that claim of the appellant, there was prejudicial error in not instructing thereon, and in not directing the jury that the statute requiring cars to be provided with the automatic couplers did not apply to engines and their tenders. The instructions given did not, therefore, define the issues clearly, nor direct the jury what the material allegations thereof were.

It is not, in our judgment, negligence per se not to equip engines and tenders with the latest devices for coupling, but we think it may properly be shown that such devices are practical in the operation of the road, and that they tend to promote the safety of employees, and that such evidence may be properly considered by the jury in determining the question of negligence in using some older or different appliance. (2 Thompson, Negligence, sec. 2258.) But without this showing of practicability and additional safety it is not, as we view it, competent to show that such appliances are in general use by other roads, for, if an appliance is not practical and safe, the fact of its general use would not alone excuse the defendant. (2 Thompson, Negligence, secs. 2253, 2254. See also *Metzgar* v. *Railway Co.*, 76 Iowa, 387.)

For the reasons given, the judgment is reversed.

O

CARSON V. SOUTHERN RY. CO. ET AL.

(Supreme court of South Carolina. December 26, 1903.)

[Reprinted from Southeastern Reporter, vol. 46, page 525.]

APPEAL—EXCEPTIONS—INJURY TO SERVANT—COMPLAINT—CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE—OPINION EVIDENCE—NONSUIT—KNOWLEDGE OF DEFECTS—RAILROADS—AUTOMATIC COUPLERS—ASSUMPTION OF RISK—INSTRUCTIONS—JOINT TORT.

1. An exception that the court erred in overruling a demurrer to the complaint, as not stating a cause of action, is too general.
2. Where, in an action for injuries to a servant, the complaint alleges negligence in the master in furnishing appliances, and negligence in his servants in using them, it states a cause of action of joint and several negligence.
3. A servant who disobeys a rule of the master in compliance with the instruction of the representative of the master on the spot is not guilty of contributory negligence. (See Master and Servant, vol. 34, Cent. Dig. § 730.)
4. Where a complaint states several causes of injury, it was a matter for the jury to determine whether any or all of the acts of the defendant, viewed jointly or separately, was the proximate cause of plaintiff's injury.
5. In an action for injuries to a servant, the opinion of a witness as to whether the accident would have happened if plaintiff had reported a defect in the machinery to the master, is incompetent.
6. Where a complaint in an action for personal injuries alleges several acts of negligence, it is error to grant a nonsuit on failure to prove that one of them was the proximate cause of the injury.
7. In an action for injuries to a railroad employee, evidence held to show that a servant was not guilty of contributory negligence in going between the cars to couple them, under instructions of the conductor, in disobedience of the rules of the company.
8. Where an action is brought for a joint and several tort, and there is evidence as to the negligence of one defendant, a nonsuit can not be granted.
9. In an action for injuries caused by defects in machinery, knowledge by the servant of the defects is no defense, under constitution 1895, article 9, section 15.
10. The circuit court, in the trial of a case, is bound by the decisions of the supreme court.
11. Under act Congress March 2, 1893, chapter 196, section 1, 27 Statutes, 53 [U. S. Comp. St. 1901, p. 3174], providing that the carriers engaged in interstate commerce shall equip their cars with automatic couplers, if defendant railroad company was a common carrier engaged in interstate commerce, and the cars were not equipped with such couplers, whereby plaintiff was injured, defendant was liable.

12. A railroad company must furnish an employee with safe appliances, and see that they are kept in proper repair; and, where the duty is negligently performed, and the employee suffers injury thereby, the railroad company is liable.
13. The risk which a railway employee assumes when he enters the employment does not extend to risks by reason of defective machinery.
14. An instruction that, where a servant's work is done in the presence and under the direction of a conductor of a train, it is equivalent to an assurance by the master that the servant may safely do the work required of him, and is not bound to search for danger, is not erroneous, as a charge on the facts.
15. The granting of an instruction against arriving at a quotient verdict is in the discretion of the trial court.
16. Where, in an action by a railroad employee for personal injuries, the complaint alleges a joint and several tort, consisting of the defective appliances and negligence on the part of the servants, and the jury finds in favor of the servants, but against the master, the verdict should not be set aside.

Appeal from common pleas circuit court of Greenville County; Watts, judge.

Action by J. L. Carson against the Southern Railway Company, J. C. Arwood, and J. D. Miller. From a judgment for plaintiff, defendant Southern Railway Company appeals. Affirmed.

T. P. Cothran, for appellant. *McCullough & McSwain*, for respondent.

POPE, C. J. This action was commenced in the court of common pleas for Greenville County, in this State, to recover damages on account of personal injuries received by the plaintiff at Converse, S. C., August 16, in the year 1902, to wit, the plaintiff's arm was crushed between two cars (while in the service of the defendant) which he was attempting to couple, and was amputated. The defendant demurred to the complaint because it failed to state facts sufficient to constitute a cause of action. This was overruled. The defendant objected to testimony, which objection was overruled. The defendant moved for a nonsuit at the close of plaintiff's testimony in chief. This motion was overruled. The defendant objected to the charge of the circuit judge. The defendant moved for a new trial, which motion was denied. The defendant then moved in arrest of judgment, and this motion was refused. The defendant then, and lastly, made a motion for the circuit judge to direct a judgment in its favor on the verdict. This was denied. The verdict was in favor of the plaintiff for $6,500. After entry of judgment, the defendant appealed, alleging error in all the matters or steps in the trial above enumerated. To understand these exceptions it may be stated that the defendant has numbered its exceptions from 1 to 48, inclusive, and we will treat these exceptions in the same way. Inasmuch as the first eight exceptions complain of the order of the

circuit judge overruling the demurrer, it will be proper to reproduce the complaint, which is as follows:

"(1) That the defendant Southern Railway Company is a railway corporation chartered under the laws of the State of Virginia, and as such is, and was at the times hereinafter mentioned, doing business in the counties of Spartanburg, Greenville, and other counties of the State of South Carolina, as a common carrier of passengers, and also of freight; running its railroad track and trains, both passenger and freight, in and through the said counties of Spartanburg, Greenville, and other counties in the said State.

"(2) That the defendants J. C. Arwood and J. D. Miller are now, and were at the dates hereafter mentioned, citizens and residents of Greenville County, State of South Carolina.

"(3) That the plaintiff is a resident of the county and State aforesaid, is 35 years of age, and has a wife and four children dependent upon his daily labor for support, his eldest child being 12 years of age.

"(4) That since December 8, 1901, plaintiff was in the employ of the defendant Southern Railway Company, and was on that day assigned the duties of flagman, and on the 15th day of August, 1902, was assigned by defendant to duty on a freight train belonging to the defendant Southern Railway Company, in charge of its agents and employees, known as second section of No. 43, and running between Spencer, N. C., and Greenville, S. C., and plaintiff was assigned the duty of flagman on said freight train.

"(5) That plaintiff entered upon and performed the duties of such position, and on the 16th day of August, 1902, was ordered by the conductor in charge of said freight train, and whose orders he was required to obey, to do the work of a brakeman on the said freight train, the regular brakeman on the said train having been assigned other duties.

"(6) That while the said freight car was at the station known as Converse, in Spartanburg County, State aforesaid, the right arm of plaintiff was crushed by a collision of two freight boxes, whereby plaintiff suffered great and excruciating pain and mental anguish, and, as a result, lost entirely the said right arm, which had to be amputated, and that said collision and injury which plaintiff sustained by reason thereof were due to the joint and concurrent negligence, carelessness, and fault of the defendants, and to their joint and concurrent recklessness, carelessness, willfulness, and wanton disregard of the plaintiff's rights and safety, in the following manner, to wit: That between Charlotte, N. C., and Greenville, S. C., at the said station of Converse, said freight train of the said defendant Southern Railway Company stopped for the purpose of shifting to the sidetrack of the said defendant Southern Railway Company,

which sidetrack was upon a steep grade, and near the main line of defendant company, five freight cars or boxes. That there were at that time standing upon the sidetrack three other freight cars or boxes, and, in order to prevent the said cars or boxes from rolling down the said deep grade, it was necessary to couple the said three cars or boxes to be shifted and left upon the said sidetrack, and this plaintiff was directed by the defendants to make the said coupling. That the defendant J. C. Arwood was conductor, and the defendant J. D. Miller was engineer, upon the said freight train. That the said freight boxes or cars were provided with what is commonly known as automatic couplers, and, when said couplers are in good condition, it is unnecessary for one, in order to make the said coupling, to go between the said cars; but the said couplers worked with a pin and iron crank, the handle of which iron crank projects to the side of the said boxes or cars, and the said pin by which the said cars are coupled is manipulated by using the said crank. That after having effectually made one coupling between the said cars, as directed by the defendants, plaintiff approached to make the other coupling, as directed by the defendants; and before doing so he warned the defendants to hold said car steady until he (the plaintiff) was ready to make such coupling, and until plaintiff should so signify. That, when plaintiff reached the said car, then to be coupled, he ascertained that the coupling pin was out of, and lying upon, the drawhead of the coupler, and thereby ascertained that the said coupler was out of order, in that when the said coupler is in proper condition there is what is known as a cotter pin running through the said coupling pin at the lower end, thereby preventing it from being drawn entirely out of the said drawhead, and the defendants knew, or ought to have known, that the said coupling pin was out of order; and this fact made it necessary for the plaintiff to go between the said cars for the purpose of adjusting the said pin with his hand, and to carry out the order of the defendants, since he could not, while it was in that position, adjust it with the iron crank above described; and this plaintiff went between the said cars for the purpose of adjusting the said pin in order to make the said coupling, and as he was directed by the said defendants, when he heard the cars of said train in motion and knocking together before he had effected the said coupling, or had sufficient time to do so, and, in order to save himself from being crushed between the said cars, the plaintiff attempted to get out from between the said cars on which he was engaged in the work of coupling, and, as he did so, his right arm was caught between the dead blocks of the said freight cars, between which he was standing, and was horribly mangled. That, at the time plaintiff heard the cars in motion, he had only time to go between the cars, and had placed his left hand upon the iron

crank, and his right hand upon the pin, for the purpose of placing it in the proper position, and had not had time to place the pin in proper position, or to couple the said cars. That the defendants, by their joint and concurrent negligence, and by their joint and concurrent carelessness, recklessness, wantonness, negligence, and willfulness, backed the said engine, to which was attached the said freight cars, without any signal or warning from this plaintiff, and without giving this plaintiff time to effect the coupling of the said cars, and without giving this plaintiff any notice or warning whatsoever that the said engine and cars were to be moved.

"(7) That in consequence of the said injury it was necessary to amputate plaintiff's right arm just below the elbow, and in consequence of the said injury and amputation plaintiff has suffered great mental anguish and pain, and has been deprived of the use of his strong right arm for the support of himself and family, all to his damage $15,000."

The exceptions are as follows, as relating to the demurrer:

"(1) The error of the presiding judge in overruling the demurrer to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action.

"(2) Error of the presiding judge in not sustaining the first ground of demurrer to the complaint, which was as follows: 'The complaint does not show negligence on the part of the defendants, or either of them.'

"(3) Error of the presiding judge in not sustaining the second ground of demurrer to the complaint, which was as follows: 'The complaint shows contributory negligence on the part of plaintiff.'

"(4) Error of the presiding judge in not sustaining the third ground of demurrer to the complaint, which was as follows: 'So far as the allegation of negligence in regard to the absence of the cotter pin (defective machinery appliances) is concerned, the complaint does not show that the injury complained of resulted therefrom as a proximate cause thereof.'

"(5) Error of the presiding judge in not sustaining the fourth ground of demurrer to the complaint, which was as follows: 'So far as the allegation of negligence in regard to the backing of the engine without signal, warning, or notice is concerned, the complaint shows that this was the act of the engineer or conductor, or both. It was therefore the negligence (if any at all) of the servant or servants of the railway company, for which the railway company, in a proper action, may be held responsible. This action, however, is based upon an allegation of joint and concurrent tort on the part of master and servant. To constitute such a tort, it must appear that the master and servant each had a direct share therein; that they each actually participated therein. The imputed liability of the master for the

wrong of the servant, in which the master has not participated, and which he neither authorized nor ratified, does not, in connection with the personal liability of the servant for the wrong, present a case of joint and concurrent tort.'

"(6) Error of the presiding judge in not sustaining the fifth ground of demurrer to the complaint, which was as follows: 'The complaint alleges an act of negligence on the part of the master (failure to provide suitable appliances) and an act of negligence on the part of the servant or servants (backing the engine without notice, signal, or warning). It does not charge any participation by either in the negligence of the other, and therefore does not present a case of joint and concurrent tort.'

"(7) Error of the presiding judge in not sustaining the sixth ground of demurrer to the complaint, which was as follows: 'The principles contended for in specification 4 are particularly applicable to the charge of joint willful tort. The master can not be held liable jointly with the servant for the willful tort of the servant unless the master authorized or ratified it.'

"(8) Error of the presiding judge in not sustaining the seventh ground of demurrer to the complaint, which was as follows: 'The complaint alleges that the acts of the defendants complained of were both negligent and willful. This is an impossibility. Negligence and willfulness are the opposites of each other.'"

(1) This exception is too general. It is therefore overruled.

(2) It seems to us that the allegations of the complaint directly charge negligence to the defendants, both jointly and severally. It alleges directly that the master erred in keeping the plaintiff supplied with proper machinery and in keeping such machinery in proper repair. The conductor was acting directly for the master when he failed to notice the want of any signal from the servant before ordering its train to move back. This exception is overruled.

(3) No doubt the exception relies at this point upon the failure in the plaintiff to cary out the rule of defendant which forbids the servant from going between the cars to couple cars. But the allegations of the complaint cure this apparent difficulty when the presence and directions of the conductor as vice-principal are remembered. This exception is overruled.

(4) A little reflection will show that this exception can not be sustained. The complaint in paragraph 6 is careful so to link the causes of the injury that the absence of the cotter pin from its proper place is not made the causa causans of his injuries. It was a matter for the jury to determine whether any or all of the acts of the defendants, viewed jointly or separately, was the proximate cause of plaintiff's injuries. The quotations of authorities may include *Pickens* v.

S. C. & G. R. R. (54 S. C., 498; 32 S. E., 567) and *Marsh* v. *Western Union Tel. Co.* (65 S. C., 430; 43 S. E., 953).

The fifth, sixth, and seventh exceptions are conclusively answered by the recent decisions of *Schumpert* v. *R. R.* (65 S. C., 332; 43 S. E., 813) and *Gardner* v. *Southern Ry. Co.* (65 S. C., 341; 43 S. E., 816). The appellant in his argument says: "They appear to be concluded, so far as this court is concerned. * * * We do not waive them." It declines to argue these exceptions, and we think very properly so. These exceptions are overruled.

(8) The appellant concedes that this exception is concluded by the case of *Schumpert* v. *R. R. Co.* (*supra*), and formally abandons the same. Hence we sustain the circuit judge in overruling the demurrer.

2. The single exception as to alleged error of the circuit judge in sustaining plaintiff's objection to the question asked plaintiff by defendant is in these words: "(9) Error of the presiding judge in sustaining plaintiff's objection to the following question asked the plaintiff by defendants' counsel: 'Don't you know that, if you had reported that [fact that the pin was out of order] to the conductor, this accident would not have occurred?' The question was competent and relevant. It was plaintiff's duty, under rule 12, to report said defect, and his knowledge of the rule and its purpose had material bearing upon defendants' plea of contributory negligence." This exception can not be sustained. Appellant did not argue it. It was purely asking for an opinion. How did witness know what effect such a report by him to the conductor would produce? It is overruled.

3. We will next consider the group of exceptions relating to the nonsuit that was refused.

"(10) Error of presiding judge in overruling the first ground of defendant's motion for a nonsuit, as follows: 'The alleged negligence in regard to the absence of the cotter pin (defective machinery appliances) is not shown, but any testimony tending to establish that fact to have been a proximate cause of the injury complained of.'

"(11) Error of the presiding judge in overruling the second ground of defendant's motion for a nonsuit, as follows: 'The testimony shows that the proximate cause of the injury was the plaintiff's voluntary and unnecessary exposure of his person to the moving cars.'

"(12) Error of the presiding judge in overruling the third ground of defendant's motion for nonsuit, as follows: 'The complaint alleges the plaintiff's injuries were caused by the joint and concurrent tort of the defendants. The evidence does not tend to sustain this allegation. On the contrary, if it tends to show any actionable negligence it is the negligence of either the engineer or conductor, for

which, in a proper action, the defendant company may be held liable, but which does not make out a case of joint and concurrent tort.'

"(13) Error of the presiding judge in overruling the fourth ground of the defendants' motion for a nonsuit, as follows: 'The plaintiff having alleged a joint and concurrent tort of all the defendants, the defendant Southern Railway Company has been deprived of the privilege of removing this cause to the United States court. He should be required to prove the facts alleged. To allow him to proceed in the State court without some evidence of this fact would deprive the defendant of a substantial right guaranteed by the Constitution of the United States.'

"(14) Error of the presiding judge in overruling the fifth ground of defendants' motion for a nonsuit, as follows: 'To allow the plaintiff, after alleging a joint and concurrent tort by the railway company and its servants, to recover without evidence of such joint and concurrent tort, but simply on evidence of a negligent act of the servant, in which the master did not participate, and which he neither authorized nor ratified, would deprive the defendant railway company of its property without due process of law, contrary to amendment 14, Constitution of the United States, for this reason: It would deprive said company of the right of reimbursement from the defaulting servant, which would otherwise exist.'

"(15) Error of the presiding judge in overruling the sixth ground of defendants' motion for a nonsuit, as follows: 'The defendant company is not liable in punitive damages for a willful tort of one of its servants. To hold otherwise would deprive said company of its property without due process of law, contrary to the constitution of South Carolina and article 14 of the amendments to the Constitution of the United States.'

"(16) Error of the presiding judge in overruling the seventh ground of defendants' motion for a nonsuit, as follows: 'Even if the evidence tends to show an act of negligence on the part of the master (defective appliance) and an act of negligence on the part of the servant or servants (backing the train without notice, etc.), it does not tend to show any participation by either in the act of the other, and therefore does not present a case of joint and concurrent tort.'

"(17) Error of the presiding judge in overruling the eighth ground of the defendants' motion for a nonsuit, as follows: 'The testimony does not tend to show any negligence, as alleged, on the part of the engineer; and even if it shows negligence, as alleged, on the part of the company, the action being based upon an alleged joint concurrent tort of the defendants, it must for this reason fail.'

"(18) Error of the presiding judge in overruling the ninth ground of the defendants' motion for a nonsuit, as follows: 'The testimony does not tend to show any negligence on the part of the engineer.'

"(19) Error of the presiding judge in overruling the tenth ground of the defendants' motion for a nonsuit, as follows: 'The evidence shows that the defect in the coupler was known by the plaintiff before he attempted to go in between the cars.'

"(20) Error of the presiding judge in holding: 'I am bound by the decision of the supreme court of this State, and I will overrule the motion for a nonsuit.'"

Before passing upon these exceptions it might be well to state that the appellant considers that the exceptions numbered 12, 13, 14, 16, and 17, including, as they do, the question, in various phases, of the joint liability of master and servant for the single tort of the servant are, or seem to be, concluded, so far as this court is concerned, by the recent decisions of *Schumpert* v. *Railway Co.* (*supra*) and *Gardner* v. *Railway Co.* (*supra*). The appellant does not waive them, but has declined to argue them. This is a wise step on its part, for we hold that these decisions, so recently made, are conclusive as to these exceptions. So, therefore, we overrule said exceptions numbered 12, 13, 14, 16, and 17. We will now examine the remaining exceptions, under the head of nonsuit:

(10) We have already held that, under the allegations of the complaint, the absence of the cotter pin was not alone, of itself, the proximate cause of plaintiff's injuries. It was to be taken by the jury, under the testimony here offered by the plaintiff, as one of the elements of the proximate cause of such injuries. There was testimony offered by the plaintiff in this matter. Hence the circuit judge was precluded, under many decisions of this court on the subject of nonsuits, from granting the nonsuit as here suggested. Exception overruled.

(11) We do not regard that the testimony shows that the proximate cause of plaintiff's injuries was the plaintiff's voluntary and unnecessary exposure of his person to the moving cars. We distinctly remember that the testimony tended to show that there were cooperating causes for these injuries. It was shown, or, rather, there was testimony offered tending to show, that the conductor ordered this servant (the plaintiff) to couple those cars; that such conductor, in this matter, represented the master; that the servant called to such conductor to hold fast the train until he signaled; that this servant did not signal the conductor to move the train; that it was under these circumstances that the train was moved so that the two cars bumped against each other, thus causing his injuries; that, when the cotter pin was out of its place it would be necessary for a servant to go between the cars to arrange it; that it was necessary to go between the cars to open the instrument by which the coupling was to be made. This exception is overruled.

(15) We think the decisions of the State hold an opposing view,

It has been held in this State that the master is liable for the willful torts of its servants, without the master authorizing or ratifying such torts. It ought to exist when these torts occur while such servants are carrying out the directions or plans of the master. (*Cobb* v. *R. Co.*, 37 S. C., 194; 15 S. E., 878; *Skipper* v. *Clifton Manufacturing Co.*, 58 S. C., 143; 36 S. E., 509.) And there are other cases to the same effect. This exception is overruled.

(18) It must be remembered that the complaint charged a joint and several tort. There was testimony as to what the engineer did. He certainly moved the engine. Being testimony in the case connecting the engineer with the wrong alleged by the plaintiff it was not the circuit judge's duty to pass upon the sufficiency of such testimony. This exception is overruled.

(19) Suppose the plaintiff saw that the cotter pin was out of its place; the circuit judge was bound by the case of *Youngblood* v. *R. Co.* (60 S. C., at p. 22, 38 S. E., 236; 85 Am. St. Rep., 824), where it is said: "Furthermore, the only fact upon which the defendant relied to show that the plaintiff did not act with due care was that he voluntarily operated the appliances after the knowledge of their unsafe condition, and, as we have stated, this could not defeat his action." Besides, it is provided in the constitution of 1895: "Knowledge by any employee injured of the defective or unsafe character or condition of any machinery, ways, or appliances, shall be no defense to an action for injury caused thereby." (Sec. 15, art. 9.) Besides, a railroad employee may recover for injuries caused by the carelessness of a fellow-servant directing him. (*Bussey* v. *R. Co.*, 52 S. C., 438; 30 S. E., 477; *Wilson* v. *Ry. Co.*, 51 S. C., 79; 28 S. E., 91; *Bodie* v. *R. Co.*, 61 S. C., 468; 39 S. E., 715.) This exception is overruled.

(20) The circuit judge was quite correct in declaring that he was bound by the decision of the supreme court. Being the court of last resort in this State, as is the supreme court, its decisions govern the members of that court and all other persons in authority, as well as other people. This exception is overruled.

We have thus passed upon all the phases of nonsuit as here presented. We sustain the circuit judge in refusing such motion.

4. We will next consider the group of exceptions relating to the alleged errors of the circuit judge in his charge to the jury:

"(21) Error of the presiding judge in charging the jury as follows: 'The law requires them [railroads] to keep suitable appliances for running such trains, and to keep them in good condition. I charge you that any railroad engaged in running trains from State to State, under the law, they are required to have automatic coupling; and I charge you, further, that they are required to keep these appliances in good order—that is, in safe and suitable order.' The error

consisting in this: First, the duty of a master to a servant is to exercise ordinary care in keeping machinery and appliances in order. The charge of the judge imposes this duty absolutely upon the railway company, practically making it a guarantor of the safe and suitable condition of the coupling apparatus; second, the car upon which the defective coupler was is shown by the testimony to have been an empty car on the side track not used to move interstate commerce. The act of Congress, therefore, did not apply to it. (This subdivision is an amendment to the exceptions, and was allowed by respondent upon condition that it be accompanied with the statement that the point was not raised before the circuit judge that the act of Congress did not apply to the cars on side track.)

"(22) Error of the presiding judge in charging the jury as follows (the same being No. 1 of the plaintiff's request): 'By an act of Congress it is provided [act Mar. 2, 1903, c. 196, § 1, 27 Stat., 531 (U. S. Comp. St. 1901, p. 3174)] that "on and after the 1st day of January, 1898, it shall be unlawful for any common carrier engaged in interstate commerce to haul, or to permit to be hauled or used, on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." I charge that if you believe the defendant railway company was a common carrier engaged in interstate commerce, and was using for the purpose of moving interstate traffic the cars mentioned in the complaint as causing the plaintiff's injury, and that said cars were not equipped with couplers coupling automatically by impact, so as to obviate the necessity of plaintiff going between them to effect the coupling, such failure to provide such automatic couplers was negligence on the part of the railway company, which negligence continued up to the very moment of the collision, if you believe there was such a collision, and injury in consequence thereof; and, if you believe that such negligence was the proximate cause of such injury, your verdict should be for the plaintiff. The rule of the defendant company forbidding employees going between cars for the purpose of coupling or uncoupling them may be waived by it. I charge you that the conductor is the representative of the railway company, and, if said company fails to furnish appliances to brakemen by means of which they may effect said coupling without going between the cars, or furnish them appliances which make it necessary for them to go between the cars to perform the work required of them, and without objection, then it is for you to say whether or not such conduct on the part of the railway company amounts to a waiver of the said rule; and, if you do find that it amounts to a waiver, then I charge you that in such a case the railway company can not invoke the said rule in its behalf.' The errors consisting in: (*a*) The act of Con-

gress applies only when the railway company fails to use cars equipped with automatic couplers. It does not apply where the railway company has equipped its cars with such couplers, one of which is temporarily out of repair. The complaint alleges, and the plaintiff's evidence shows, that the cars were equipped with automatic couplers, but that one of them was temporarily out of repair; that it could have been repaired in two minutes. The question, therefore, was whether the railway company had violated its duty to exercise ordinary care in keeping the coupler in repair, and not whether it had complied with the act of Congress. The latter had no application to the case. (*b*) It was error to charge that the failure to provide automatic couplers was negligence, which continued up to the very moment of the collision, for the reason that rule 12 made it the duty of the plaintiff to examine the coupler, and, if defective, report such fact immediately. The plaintiff admitted that he knew it was defective before he attempted to make the coupling. (*c*) The act of Congress requires that the cars be equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars. It does not require that they be so arranged as to obviate the necessity of men going between the ends of the cars for the purpose of adjusting the knuckles for a coupling. The charge of the judge stamped it as negligence if the plaintiff, in order to make a coupling or to adjust the knuckles, had to go between the ends of the cars.

"(23) Error of the presiding judge in charging the jury as follows (the same being No. 2 of the plaintiff's requests): 'I charge you that it was the duty of the railway company in this case to furnish the plaintiff with safe and suitable appliances with which to perform the work required of him, and also see that the same were kept in proper repair, and if this duty was negligently performed, and the plaintiff sustained any injury thereby, the railway company is responsible in damages. I charge you that, provided the negligence of the railway company was the direct and proximate cause of the injury, and the plaintiff did not contribute to the direct and proximate cause of the injury.' The error consisting in this: The duty of a master to a servant is to exercise ordinary care in keeping machinery and appliances in repair. The charge imposes this duty absolutely upon the railway company, practically making it a guarantor of the safe and suitable condition of the coupling apparatus.

"(24) Error of the presiding judge in charging the jury as follows (the same being No. 3 of plaintiff's requests): 'I charge you that the risk which a railway employee assumes when he enters the employ of a railway company does not extend to such risks as he is exposed to by reason of defective machinery or appliances.' The error consisting in this: An employee assumes all risks except those

which flow from the master's negligence in his duty in furnishing safe machinery, and in keeping the same in repair. The charge was erroneous in not so stating.

"(25) Error of the presiding judge in charging the jury as follows (the same being No. 6 of plaintiff's requests): 'I charge you that contributory negligence on the part of the servant, by using appliances obviously defective, furnished by a railway company, is no longer of force in South Carolina, under the constitution of 1895.' The error consisting in this: The defendant contended that, under rule 12, it was the duty of the plaintiff to examine the coupler before attempting to effect the coupling, and to report any defect therein immediately. The charge eliminated this defense.

"(26) Error of the presiding judge in charging the jury as follows (the same being No. 7 of plaintiff's requests): 'The fact that the servant's work is done in the presence and under the immediate direction of the master's foreman, or the conductor in this case, is equivalent to the assurance by the master that the servant may safely proceed to do the work required of him, and he is therefore not bound in such a case to search for danger. He may rely for his safety upon the conduct of the conductor.' The error consisting in this: (*a*) It is a charge upon the facts, in violation of constitution, article 5, section 26. (*b*) It erroneously assumes that it was the conductor's duty to inspect the coupling. (*c*) It excludes from the jury inquiry as to the manner in which the plaintiff may have done the work. (*d*) Under rule 12, it was plaintiff's duty to examine the coupler and report defects immediately. (*e*) It relieves the plaintiff from the obligation to exercise ordinary care in avoiding danger. (*f*) It erroneously declares that, no matter what the conditions are—whether known to the conductor or not—the plaintiff may blindly go ahead and do what he is told to do. (*g*) It states an erroneous principle of law. (*h*) It destroys the defense of contributory negligence and of sole negligence of the plaintiff.

"(27) Error of the presiding judge in charging the jury as follows (the same being No. 8 of the plaintiff's requests): 'I charge you that a rule forbidding railway employees going between railway cars in motion, for the purpose of coupling or uncoupling them, or where attached to an engine, within itself, is a reasonable requirement; but such rule must be taken with the qualification that the company will provide other means for performing the necessary service, and, if it fails to do this, the rule is no protection to the company against liability for damages for injury sustained in doing the work required to be done, and in the performance of which said rule is violated.' The error consisting in this: The rule prohibits the brakeman from going between the cars while coupling or uncoupling them, either (1) while the cars are in motion, or (2) while an engine is attached

to them. The charge declares that when the brakeman is injured while violating this rule, in either particular, the company can not invoke the rule in its defense unless it has provided other means for the service, which renders it unnecessary for the brakeman to go between the cars. In this, error is assigned. As applied to (1), it means either that the company must stop the cars or that it must provide means for the brakemen to make the coupling without going between the cars while they are in motion. If the former, the means were at hand. All that was necessary was a word from the brakeman. If the latter, it presents the anomaly of requiring the company to furnish the means of performing the service in a way prohibited by it. As applied to (2), the same objections apply mutatis mutandis. The charge is erroneous for another reason: The plaintiff had stipulated in form 607 that he would not violate this rule, and would not obey any order to that effect. And for the further reason: The conditions which made it apparently necessary for the plaintiff to violate the rule may have been brought about by the negligence of a fellow-servant of the plaintiff.

"(28) Error of the presiding judge in charging the jury as follows (the same being No. 11 of the plaintiff's requests): 'I charge you that the rule of the railway company with reference to coupling or uncoupling cars with a pin and stick while the cars are attached to an engine or in motion has no application to a case where the master fails to furnish to the servant a pin and stick sufficient to effect the said coupling.' The error consisting in this: It should have been left to the jury to say whether or not the plaintiff had obligated himself, under rule 10 and form 607, to supply himself with a stick, even if it was not the duty of the court to so construe the rule and form, which defendant claims.

"(29) Error of the presiding judge in charging the jury as follows (the same being No. 14 of the plaintiff's requests): 'If the jury find that the rule forbidding the going between the cars in motion or when attached to an engine, and forbidding the setting of pins and links except with a stick, was adopted by defendant railway company when a method of coupling cars prevailed by the use of a pin and link, and if the jury find that the said method of coupling cars has been superseded by a method whereby no pins need be set, or pins and links need be used, then it is for the jury to say whether or not said rule was at the time of the injury complained of in force, and whether or not plaintiff was then bound by the same.' The error consisting in this: No matter what system may have been adopted, the danger of going between the cars while making a coupling was great, and the company had the right to provide by rule and contract against it. The charge makes this right depend upon the continuance of the link-and-pin method of coupling.

"(30) Error of the presiding judge in charging the jury as follows (the same being No. 21 of the plaintiff's requests to charge): 'Notwithstanding plaintiff has alleged in his complaint joint and concurrent negligence on the part of all the defendants, I charge you that if the proof fails to show such joint and concurrent negligence on the part of all the defendants, yet shows negligence on the part of one or more of the defendants, which negligence resulted in injury to plaintiff, as the sole and proximate cause thereof, then you may find a verdict against such defendant or defendants as the proof shows was guilty of such negligence.' The error consisting in this: (*a*) By the simple allegation of joint and concurrent tort, the defendant Southern Railway Company, a foreign corporation, has been deprived of the right to remove the cause to the Federal court. The plaintiff should prove the allegations of his complaint. To allow a recovery against one only of several alleged tort feasors put it in the power of the jury to do as they did—find against the railway company, and in favor of the servants whose negligence is alleged to have caused the injury. The defendant railway company is thus deprived of a substantial right—that of removal—guaranteed by the Constitution and laws of the United States.' (*b*) A plaintiff has no right to come into court upon one alleged cause of action—for instance, a joint and concurrent tort—and recover upon proof of a several tort.

"(31) Error of the presiding judge in refusing the defendants' first request to charge as follows: 'The plaintiff having alleged a joint and concurrent tort of the defendants, the defendant Southern Railway Company, a foreign corporation, has been deprived of the right, where the tort was not joint and concurrent, to remove this cause to the United States court. To sustain this action, the plaintiff must therefore prove that the acts complained of were the joint and concurrent negligence and tort of the railway company and at least one of the other defendants.' Said request contained a correct principle of law applicable to the case.

"(32) Error of the presiding judge in modifying the defendants' second request to charge, which was as follows: 'The negligence of a servant, for which, and on which account only, the master is liable, is not the joint and concurrent negligence of the master and servant.' The modification was as follows: 'I charge you that, with this modification: Unless the servant represents the master so that his acts will bind him, and that you find that the servants of the company were negligent.' The error consisted in this: The request contained a correct principle of law applicable to the case. The modification emasculated the request. It was error to hold that where the servant represents the master, so that his acts will bind him, the negligence of the servant makes out a case of joint and concurrent negligence on the part of both master and servant.

"(33) Error of the presiding judge in refusing the defendants' third request to charge, which was as follows: 'To constitute a joint and concurrent tort on the part of master and servant, it must appear that each had a direct share in such tort; that each actively participated therein. The imputed liability of the master for the wrong of the servant, in which the master has not participated, and which he neither authorized nor ratified, does not, in connection with the personal liability of the servant for the wrong, present a case of joint and concurrent tort.' Said request contained a correct principle of law applicable to the case.

"(34) Error of the presiding judge in refusing defendants' fourth request to charge, which was as follows: 'To allow the plaintiff, after alleging a joint and concurrent tort by a foreign corporation and its servant or servants, to recover damages without proof of such joint and concurrent tort, would deprive such corporation of the right of removal to the United States court—a right guaranteed by the Constitution and laws of the United States, and which would exist were the tort several, and not joint and concurrent.' Said request contained a correct principle of law applicable to the case.

"(35) Error of the presiding judge in refusing the defendants' fifth request to charge, which was as follows: 'To allow the plaintiff, after alleging a joint and concurrent tort by a railway corporation and its servant or servants, to recover damages without proof of such joint and concurrent tort, but simply upon proof of a negligent act on the part of such servant or servants, would deprive the railway company of its property without due process of law, contrary to amendment 14, Constitution of United States, for this reason: It would deprive said company of the rights of reimbursement from the defaulting servant or servants, which would exist were the tort not joint and concurrent, but simply the wrong of the servant or servants, for which the company may be liable.' Such request contained a correct principle of law applicable to the case.

"(36) Error of the presiding judge in refusing the defendants' sixth request to charge, which was as follows: 'Even if the railway company was negligent in the matter of the alleged defective coupling, and the servant or servants were negligent in the matter of backing the train without signal, etc., they could not be held jointly liable for the combined results of their acts, if they acted independently in producing the injury, and neither participated in the several act of the other.' Such request contained a correct principle of law applicable to the case.

"(37) Error of the presiding judge in modifying the defendants' seventh request to charge. The request was as follows: 'If the sole proximate cause of the plaintiff's injury was the negligence of the engineer, the jury must find for the defendant railway company, for

an engineer or brakeman or flagman upon the same train, while employed in the duties usually pertaining to their respective positions, are fellow-servants. A master is not liable to a servant for injuries received in consequence of the negligence of a fellow-servant.' The modification was as follows: 'I charge you that, with this modification: If the plaintiff was not performing the ordinary duties for which he was employed, he does not assume the risk of negligence of fellow-servants.' The error consisting in this: The request contained a correct proposition of law applicable to the case. Inasmuch as the evidence showed that the ordinary duties for which the plaintiff was employed were those of a flagman, and that he was pro tempore performing, not those duties, but those of a brakeman, the modification was calculated to mislead the jury. Although the plaintiff may have been employed as a flagman, yet, if he for the day had undertaken the duties of a brakeman, the rule of fellow-servants would apply.

"(38) Error of the presiding judge in modifying the defendants' eighth request to charge. The request was as follows: 'If the railway company furnished the plaintiff a rule book with the following rule: "Cars must not be coupled or uncoupled or pin set by hand. For this purpose brakemen will use sticks, which will be furnished them on application; and every brakeman is required to supply himself with one of these sticks, and see that it is long enough to prevent his going between the cars to couple or uncouple them or to set pins. Any employee going in between cars while such cars are coupled to the engine or being so coupled, for the purpose of coupling or uncoupling cars or to set pins or links, or for any other purpose while the train or cars are in motion, does so at his own risk." And if the plaintiff violated this rule, and such violation was a proximate cause of his injury, or contributed thereto, with the negligence of the defendants as a proximate cause thereof, he is not entitled to any damage.' The modification was as follows: 'I charge you that, with this modification: Provided, the rule is not contrary to law, has not been waived by the defendants, and the violation of the same was negligence, and the proximate cause of the injury.' The error consists in this: (*a*) The court, not the jury, should have passed upon the question whether or not the rule was contrary to law. (*b*) The negligence of the plaintiff need not be the proximate cause of the injury. It will relieve the defendant if it be a proximate cause contributing with the negligence of the defendant.

"(39) Error of the presiding judge in modifying the defendants' ninth request to charge. The request was as follows: 'If the railway company furnishd the plaintiff with a rule book, containing a rule warning him that going between cars in motion to couple or uncouple

them was dangerous, and violation of duty, and if they do so it will be at their own risk, and if the plaintiff violated this rule, and such violation was a proximate cause of his injury, or contributed thereto, with the negligence of the defendants as a proximate cause thereof, the plaintiff is not entitled to any damage.' The modification was as follows: 'I charge you that, with the same modification as above.' The error consisted in this: (*a*) The court, not the jury, should have passed upon the question whether or not the rule was contrary to law. (*b*) The negligence of the plaintiff need not be the proximate cause of the injury. It will relieve the defendant if it be a proximate cause, contributing with the negligence of the defendant.

"(40) Error of the presiding judge in refusing the defendants' tenth request to charge, which was as follows: 'If the railway company furnished the plaintiff with a rule book, containing a rule requiring him, before exposing himself in working with the cars, to examine for his own safety the condition of such cars, or whatever he may undertake to work on or with, and to promptly report to his immediate superior officer any defect therein affecting the safety of anyone using or operating upon or with the same, and if the plaintiff violated such rule, and such violation was the proximate cause of the injury, or contributed thereto, with the negligence of the defendants, as the proximate cause thereof, the plaintiff is not entitled to any damage.' Such request contained a correct principle of law applicable to the case.

"(41) Error of the presiding judge in modifying the defendants' eleventh request to charge. The request was as follows: 'If the plaintiff executed the paper in evidence marked "Form 607," and violated the agreement on his part contained therein, and such violation was the proximate cause of his injury, or contributed thereto, with the negligence of the defendants as a proximate cause thereof, the plaintiff is not entitled to any damage.' The modification was as follows: 'I charge you that, with this modification: Provided, under the circumstances, his violation thereof was negligence, and such negligence proximate cause of the injury.' The error consisted in this: The negligence of the plaintiff need not be the proximate cause of the injury. It will relieve the defendant if it be a proximate cause, contributing with the negligence of the defendant.

"(42) Error of the presiding judge in refusing the defendants' sixteenth request to charge, which was as follows: 'A quotient verdict is illegal; that is, a verdict arrived at by agreement that each juror should name his estimate of the damages, and that the sum of all the several estimates, divided by twelve, shall be the verdict. This is an improper way to arrive at a verdict.' Such request contained a correct principle of law, and was an instruction proper to be given.

"(43) Error of the presiding judge in modifying the defendants' eighteenth request to charge. The request was as follows: 'If the plaintiff was not injured directly by the alleged defective coupling, but by a cause remotely, indirectly, connected therewith, and the plaintiff, before he was hurt, knew that it was out of repair, so that attempt to use it was dangerous, and he nevertheless attempted to use it after such knowledge, it is for the jury to say whether, under the circumstances, he failed to exercise ordinary care and prudence, and was thereby guilty of negligence. If so, he is not entitled to any damages.' The modification was as follows: 'I charge you that, with this modification: Provided, there can be no negligence by use of appliances obviously defective.' The error consisted in this: (*a*) The constitutional provision in reference to a servant's knowledge of defective machinery applies only to cases where the injury is caused directly by the defective condition of such machinery. Hence, when the injury is not so caused, the servant may be guilty of contributory negligence in the uses of machinery which he knew was defective. A servant may be guilty of contributory negligence in the use, or in the method of use, of appliances obviously defective.

"(44) Error of the presiding judge in refusing the defendants' nineteenth request to charge, which was as follows: 'If the jury believe from the evidence that the plaintiff has failed to prove any negligence on the part of either the railway company or either of the other two defendants, they must find for the defendants. The complaint being based upon a joint, concurrent tort, the plaintiff must stand or fall by this allegation. He can not recover upon proof of negligence upon the part of any one or any two of the defendants.' Such request contained a correct proposition of law applicable to the case.

"(45) Error of the presiding judge in refusing defendants' twentieth request to charge, which was as follows: 'If the injury was caused directly by the act of the conductor or alone, and remotely by the negligent act of the railway company, the railway company is entitled to a verdict.' Such request contained a correct principle of law applicable to the case."

It is our duty to announce on the threshold of our investigation of the exceptions that the appellant here, in his printed agreement, announces that its exceptions 30, 31, 32, 33, 34, 35, 36, 44, and 45 involve the question, in various phases, of the joint liability of master and servant for the single tort of the servant, and that such exceptions appear to be concluded, so far as this court is concerned, by the recent decisions of this court in the two cases of *Schumpert* v. *R. Co.* (*supra*), and *Gardner* v. *R. Co.* (*supra*). But they, while making this admission, do not waive their said exceptions. For the reasons set out in those two decisions, which are so recently made as

to render it unnecessary to repeat the argument thus used, we overrule these said exceptions. We will now proceed to pass upon the remaining exceptions of this group.

(21) Our decisions of *Gunter* v. *Graniteville Manufacturing Co.* (18 S. C., 262; 44 Am. Rep., 573); *Lasure* v. *Graniteville Manufacturing Co.* (18 S. C., 275); *Bussey* v. *Charleston and Western Carolina Railway Co.* (52 S. C., 438; 30 S. E., 477); *Youngblood* v. *South Carolina and Georgia R. Co.* (60 S. C., 9; 38 S. E., 232; 85 Am. St. Rep., 824), and other cases in this State, all hold that it is the duty of the master to furnish safe machinery and appliances to its servants, and also to keep such machinery and appliances in good order. The master is not made a guarantor, strictly. But it is his duty to furnish safe machinery and appliances, and to preserve it in good order and repair. The circuit judge did not use the word "guarantor" as to the master. He correctly stated the rule in this State. The act of Congress in relation to couplings to cars engaged in interstate commerce peremptorily demands that carriers of interstate commerce shall use automatic couplings to the cars used by them. This defendant was a carrier of freight of interstate commerce, and, of course, it was bound by the act of Congress, no matter what rules they may have adopted for the government of their servants. The circuit judge properly stated the rule. It is well known that Congress took control of these matters for wise purposes, among which was the protection of railroad employees. This exception is overruled, especially as no specific requests were made for fuller instructions.

(22) We can not sustain this exception, and it is overruled. The circuit judge had the act of Congress governing couplers in trains engaged in interstate commerce. It would be a want of wisdom and a disregard of law for this act of Congress to be emasculated. Courts and the people of this country are obliged to adhere to and be governed by acts of Congress. Of course Congress intended, when they directed these automatic couplers should not only be provided and attached to cars, that such appliances should be kept in proper repair for constant use. It is the law of this State, even if the act of Congress in question had overlooked this duty of keeping such appliances in good order, which includes proper repairs, that master shall keep all machinery and appliances in repair. This exception is overruled.

(23) We do not see that the judge's charge was improper. He charged the law of this State. He did not use language which made the master a guarantor of the machinery and appliances, especially as the circuit judge was careful to say, "Provided, the negligence of the master was the direct and proximate cause of the injury," etc. This exception is overruled.

(24) There was no error here. The servant does not assume the risks of the master, and, as we have seen it, it is the master's duty

to furnish safe machinery and appliances and keep the same in proper repair. Confine your criticism to what the judge actually charged. If a party wishes a fuller charge, he must ask for it. Then, if the circuit judge is in error, there is just ground of complaint. This exception is overruled.

(25) The Constitution is a full protection of the servant as to defective machinery and appliances. See section 15 of article 9, which has been construed in the case of *Rutherford* v. *Southern Rwy.* (56 S. C., 446; 35 S. E., 136; especially at pp. 454 and 455, 56 S. C., and pp. 138, 139, 35 S. E.) This exception is overruled.

(26) We do not regard the charge of the judge as a charge upon the facts. He is only laying down the law to govern the jury. He nowhere refers to the testimony itself; he nowhere tells the jury that the testimony in this case is such; and it has been frequently held by this court that a master may waive the most stringent rules. Take the policies of life insurance companies. How often is there found to be a waiver of the most stringent rule by their agent! Why may not a conductor or a vice principal, in the absence of the master, but in the discharge of his responsible duties, waive the performance of a duty required of a servant under a particular rule? This exception is overruled.

(27) It is said that this charge is taken bodily from Boswell's Law of Personal Injuries, at page 279. Be that as it may, it is well-known law that the master, or his personal representative, the conductor, may waive rules which have been formulated for the general conduct of its business. Exigencies arise when instant action must be taken. "Red tape" can not be obtained. Prompt action must be taken. Rules must give way. This can be done, and is done, whenever the necessity arises which makes it either necessary or expedient. This exception is overruled.

(28) This exception can not be sustained. Coupling or uncoupling cars with a stick, when the servant has never had a stick furnished him by the master, of course, is not law. Let this exception be overruled.

(29) Of course it should have been left to the jury to say whether any change had been made. This was all the circuit judge held. This exception is overruled.

(37) The circuit judge left it to the jury to say whether the plaintiff was performing his ordinary duties. It will be recalled that the duties of the plaintiff were those of a flagman on this train, and not of those of a coupler of cars or a brakeman. Having to obey the orders of the matsers, on that day he was required to couple cars. The latter was not his ordinary or usual duty. The servant only assumes the risk of negligence of fellow-servants. (*State* v. *Telephone Co.*, 61 S. C., 96; 39 S. E., 257; 55 L. R. A., 139; 85 Am. St.

Rep., 870; 20 A. & E., 132; 12 A. & E., 989.) This exception is overruled.

(38) The modification of a request as made by the circuit judge was properly made to meet the issues here presented. It was his duty to do so. This exception is overruled.

(39) This exception must be overruled upon the same ground set out in 38.

(40) We think the circuit judge fairly presented the issue, and it would have been improper to have made this charge. The request assumed that the violation of the rule by the servant would be negligence. This exception is overruled.

(41) The modification of the request made by the circuit judge was proper. This exception is overruled.

(42) We think the circuit judge very properly refused to charge the quotient verdict would be illegal. Never suggest evil to a jury. Let them understand that twelve jurors must agree to a verdict, and that such verdict must be based upon the law and the evidence. It was within the judge's discretion, at any rate. This exception is overruled.

(43) The modification of the request to charge was in strict conformity to the rule set up in our constitution of 1895. See section 15, article 9. This exception is overruled.

5. Having overruled all the exceptions in this group, we will now dispose of the appeal relating to new trial:

"(46) Error of the presiding judge in refusing the defendants' motion for a new trial upon the following grounds: (*a*) The verdict in favor of the conductor and the engineer settled in the railway company's favor the question of its liability by reason of the alleged negligence of those servants. There was nothing left in the case then, except the alleged negligence regarding the defective coupler. The evidence as to that showed that it was not the proximate cause of the injury. (*b*) The plaintiff knew of the defective coupler before he went in between the cars, and, that defect not having been the proximate cause of the injury, he assumed the risk, and was guilty of negligence which caused or contributed to the injury. (*c*) The plaintiff, by stipulation, agreed not to go in between cars while in motion or attached to an engine, for the purpose of coupling. He did so, was injured, and is now precluded from recovering damages. (4) The rules likewise forbid this action. He violated them, was injured, and is now precluded from recovering damages. (*f*) The verdict shows that there was no joint and concurrent negligence, as alleged." We should state that the appellant admitted that our recent cases of *Schumpert* v. *R. Co.* (*supra*) and *Gardner* v. *R. R.* (*supra*) seem to conclude these questions of appeal. We hold that they do. Accordingly we overrule these exceptions.

6. We will next consider the exceptions relating to motion in arrest of judgment. The following is the exception: "(47) Error of the presiding judge in overruling the defendants' motion in arrest of judgment upon the following grounds: (*a*) The alleged cause of action was the joint and concurrent negligence of the defendants. The verdict in favor of the conductor and engineer conclusively settles this question against the plaintiff. (*b*) The verdict is inconsistent with the plaintiff's cause of action." We remark that the appellant did not argue this exception. He alleged that it appeared to be governed by the two late decisions of this court—*Schumpert* v. *R. Co.* (*supra*); *Gardner* v. *R. Co.* (*supra*). He does not abandon these grounds, but still he does not argue them. We think these points are ruled by the principle upheld by those two cases just cited, and, for the reasons therein given, we overrule these exceptions.

7. Lastly, we will pass upon the questions made in the exceptions under the head, "Motion for judgment." The exceptions are as follows: "(48) Error of the presiding judge in refusing the defendant's motion to direct judgment to be entered in its favor on the verdict upon the following grounds: (*a*) The alleged cause of action was the joint and concurrent negligence of the defendants. The verdict in favor of the conductor and engineer conclusively determines that the injury was not so caused. (*b*) The complaint and the testimony both showing that the alleged negligence of the railway company in the matter of defective coupling was not the proximate cause of the injury, there is nothing left in the case except the alleged negligence in backing the train without signal, notice, or warning. This is shown in like manner to have been the act of the conductor or engineer, or both. The jury having found that neither of these servants was negligent in that or any other particular, no responsibility attaches to the railway company, their employer, for any act committed by them, or by either of them. When the act of the servants is determined not to have been negligence, the same act, treated as the act of the master, through the instrumentality of the servant, can not be so. (*c*) In an action against master and servant for an injury caused by the alleged negligence of the servants, and a verdict is rendered in favor of the servants and against the master, the verdict in favor of the servants precludes a recovery against the master, and judgment should be rendered in favor of the master." This exception must be overruled for these reasons: The master is responsible for the tort of his servants committed by them during the administration of the duties of their offices, respectively. That the servants are not held responsible personally is because such torts were committed in the master's service. "One may be taken and the other left." (*b*) We do not except the doctrine that the defective coupler was to be considered as the proximate cause

of plaintiff's injuries. It was a compound made of several things or parts which made up the proximate cause of injury. This we have hereinbefore announced. (*c*) We do not hold with the plaintiff in this subdivision of his exception. We do not think that a verdict in favor of the servants turns the master loose thereby. This exception is overruled.

It is the judgment of this court that the judgment of the circuit court be, and it is hereby, affirmed.

Woods, J., concurs in the result.

SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* JAMES L. CARSON.

REMOVAL OF CAUSES—RECOVERY AGAINST ONE OF SEVERAL DEFENDANTS, WHO, IF SUED ALONE, MIGHT HAVE REMOVED THE CAUSE, NOT A DENIAL OF RIGHT TO REMOVE—DUE PROCESS OF LAW—ERROR TO STATE COURT—WHAT QUESTIONS REVIEWABLE.

1. A recovery against one only of several defendants charged with joint and concurring negligence does not deprive such defendant of any Federal right because, if it had been sued alone, the diversity of citizenship existing between it and the plaintiff would have authorized the removal of the cause from the State court to a Federal circuit court.
2. An employer is not deprived of its property without due process of law by a recovery against it alone in a suit in which it and its servants are charged with joint and concurring negligence, on the theory that it was thereby deprived of the right of reimbursement from the servants.
3. A question which the Federal Supreme Court can review on writ of error to a State court does not arise under the act of March 2, 1893 (27 Stat. at L., 531, chap. 196; U. S. Comp. Stat., 1901, p. 3174), requiring interstate carriers to equip their cars with automatic couplings, where no right under such act, or dependent upon its construction, was specially set up or claimed, and denied by the State court.

[No. 546.]

Submitted April 4, 1904. Decided April 18, 1904.

In error to the supreme court of the State of South Carolina, to review a judgment which affirmed a judgment of the court of common pleas of Greenville County, in that State, entered on a verdict against the railway company in a suit against it and its employees to recover damages for personal injuries alleged to be due to their joint and concurrent negligence. On motion to dismiss or affirm. Affirmed.

See same case below (S. C.), 46 S. E., 525.

Statement by Mr. Chief Justice Fuller:

Carson, a resident of Greenville County, S. C., brought this suit in the court of common pleas of that county against the Southern Railway Company, a corporation chartered under the laws of the State of Virginia, and engaged in running trains through several States as a

common carrier, and J. C. Arwood and J. D. Miller, residents of Greenville County, to recover damages for personal injuries, which, he charged in his complaint, "were due to the joint and concurrent negligence, carelessness, and fault of the defendants, and to their joint and concurrent recklessness, carelessness, willfulness, and wanton disregard of the plaintiff's rights and safety, in the following manner, to wit:"—setting forth the circumstances of his cause of action. Among other things, plaintiff alleged that he was a flagman in the employment of the Southern Railway Company, and on the day of the accident was ordered by Arwood, the conductor in charge of a certain freight train, on which Miller was engineer, to do the work of brakeman, and to couple some of the cars in the train; that these cars were provided with automatic couplers, but one of them was not in proper condition, which rendered it necessary for plaintiff to go between the cars to effect the coupling; and that the accident thereupon happened by reason of defendants' "joint and concurrent carelessness, negligence, recklessness," etc., in particulars detailed.

Defendants severally demurred, the demurrers were overruled, and defendants excepted. Defendants then answered severally, in identical terms, denying all negligence on the part of defendant, and asserting "that the plaintiff's alleged injury was the result of his own negligence." Trial was had and the jury found for plaintiff, against the railway company, judgment was entered, and the railway company appealed to the supreme court of the State. That court affirmed the judgment (46 S. E., 525), and thereupon this writ of error was allowed.

Messrs. *W. A. Henderson* and *T. P. Cothran* for plaintiff in error.
Mr. *J. Altheus Johnson* for defendant in error.

Mr. Chief Justice FULLER delivered the opinion of the court:

This case comes before us on motions to dismiss or affirm. There was certainly color for the motion to dismiss, as we retain jurisdiction with hesitation, and we will dispose of the case on the motion to affirm.

By some of the many exceptions preserved on the trial, and disposed of by the State supreme court, it was sought to raise Federal questions in respect of the acts of Congress (1) providing for the removal of cases from a State court to a court of the United States, and (2) providing that railroad companies engaged in interstate commerce shall equip their cars with automatic couplers.

1. The railway company did not at any time apply for the removal of the case to the circuit court. Plaintiff below and the company's two codefendants were citizens of the same State, and the railway company did not make application to remove before trial on the ground of separable controversy or want of good faith in the joinder. Nor did it make such application when plaintiff's evidence was

in, nor on the whole evidence. There was no suggestion throughout the trial that the joinder was in itself improperly made, but the contention, as exhibited by the exceptions, was that a verdict could not be rendered against the company alone, because, if it had been sued alone, it would have had the right of removal. The trial court charged the jury that if the proof failed to show joint and concurrent negligence on the part of all the defendants, yet showed negligence on the part of one or more of them, resulting in injury to plaintiff, as the sole and proximate cause thereof, the jury might find a verdict against such defendant or defendants as the proof showed were guilty of such negligence; and to this instruction the railway company preserved an exception.

The railway company also excepted to the refusal of the court to give several instructions asked on its behalf, to the effect that, as by the allegation of a joint and concurrent tort, the company had been deprived of the right to remove the cause, joint and concurrent tort must be made out against the company and at least one of the other defendants; that to allow plaintiff to recover without proof of joint and concurrent tort would deprive the company of the right of removal guaranteed by the Constitution and laws; and of its property without due process of law, in contravention of the fourteenth amendment, in that the company would be deprived of the right of reimbursement which would otherwise exist. But these are matters upon the merits, and recovery against one of several defendants does not depend on whether, if sued alone, that defendant might have removed the case. The right of removal depends on the act of Congress, and the company not only, on the face of the pleadings, did not come within the act, but it made no effort to assert the right. The rule is well settled, as stated by Mr. Justice Gray in *Powers* v. *Chesapeake & O. R. Co.* (169 U. S., 92, 42 L. ed., 673, 18 Sup. Ct. Rep., 264), "that an action of tort, which might have been brought against many persons, or against any one or more of them, and which is brought in a State court, against all jointly, contains no separate controversy which will authorize its removal by some of the defendants into the circuit court of the United States, even if they file separate answers, and set up different defenses from the other defendants, and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one; for, as this court has often said, 'a defendant has no right to say that an action shall be several which the plaintiff seeks to make joint.

"'A separate defense may defeat a joint recovery, but it can not deprive a plaintiff of his right to prosecute his suit to final decision in his own way. The cause of action is the subject-matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings.'"

The review thus expressed was reiterated in *Chesapeake & O. R. Co.* v. *Dixon* (179 U. S., 131; 45 L. ed., 121; 21 Sup. Ct. Rep., 67), where the subject was much considered and cases cited. Reference was there made to the fact that many courts have held the identification of master and servant to be so complete that the liability of both may be enforced in the same action. And such is the law in South Carolina (*Schumpert* v. *Southern R. Co.*, 65 S. C., 332; 95 Am. St. Rep., 802; 43 S. E., 813). In that case it was held that under the State code of civil procedure, in actions ex delicto, acts of negligence and willful tort might be commingled in one statement as causes of injury; that master and servant are jointly liable as joint tort feasors for the tort of the servant, committed within the scope of his employment, and while in the master's service; that the objection that if master and servant were made jointly liable for the negligence of the latter the master could not call on the servant for contribution was without merit, as the rule was, as laid down by Mr. Cooley (Torts, p. 145), that: "As between the company and its servants the latter alone is the wrongdoer, and in calling upon him for indemnity the company bases no claim upon its own misfeasance or default, but upon that of the servant himself." And see *Gardner* v. *Southern R. Co.* (65 S. C., 341; 43 S. E., 816). In *Rucker v. Smoke* (37 S. C., 380; 34 A. M. St. Rep., 758; 16 S. E., 40), and *Skipper* v. *Clifton Mfg. Co.* (58 S. C., 143; 36 S. E., 509), it was decided that in actions such as this exemplary damages may be recovered. The suggestion that the State deprived the company of its property by the rulings of the supreme court calls for no remark.

2. The act of March 2, 1893 (27 Stat. at L., 531, chap. 196; U. S. Comp. Stat., 1901, p. 3174), provided, in respect of common carriers engaged in interstate commerce, "that on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." The trial court, in one of its instructions, set forth this provision, and told the jury that if they found the railway company was engaged and these cars were being used, in interstate traffic, and that they were not equipped with the automatic couplers required, such failure was negligence; and it was further charged that railroads were required to keep their appliances in safe and suitable order.

It is objected that the instructions assumed that if the automatic coupler was out of repair, the company failed to comply with the act of Congress; but we do not think so, and the supreme court of the State held that there was no error, as Congress must have intended that the couplers should be kept in proper repair for use, and more-

over, as such was the law of the State, even if the act of Congress had not specifically imposed this duty. By this ruling no right specifically set up or claimed under the act of Congress by defendant below was decided against. There was no pretence that the act of Congress provided that the automatic couplers need not be kept in order, and whether the cars in question were used in moving interstate traffic and whether the coupling appliances were defective or not, were facts left to the jury, and determined by their verdict. The recovery was not sought on the single ground of want of safe appliances. That was important in its connection with Carson's being ordered to go between the cars, and it was negligence while he was obeying that order, which was chiefly relied on. At all events, the company did not specially set up or claim any right under the act of Congress or dependent on its construction which was denied by the State courts, and the questions raised on these instructions, and numerous others on various aspects of the case, were not Federal questions, and need not be considered.

Judgment affirmed.

O

DEFECTIVE SAFETY APPLIANCES.

NEW ORLEANS AND N. E. R. CO. v. CLEMENTS.

(Circuit court of appeals, fifth circuit, February 28, 1900.)

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1. RAILROADS—ACTION FOR INJURY TO SWITCHMAN—EVIDENCE.

In an action by a foreman in railroad yards to recover for an injury received while attempting to release a set brake on a freight car being switched, by reason of a defect in the brake, a rule of the company for the government of "freight brakemen," requiring them to examine the brakes for themselves before using them, was irrelevant to the issues and properly excluded.

2. APPEAL—REVIEW—QUESTIONS PRESENTED BY RECORD.

The correctness of rulings admitting answers to a certain line of questions on cross-examination can not be reviewed where no ground was given for the objections made and the record does not show the examination of the witness in chief.

3. SAME—ASSIGNMENT OF ERRORS.

The circuit court of appeals will not consider questions attempted to be raised upon an assignment of error directed to the refusal of the trial court to give instructions asked which does not specify the errors as required by the rules, but which designates several instructions by number and alleges error generally on the refusal to give all of them.

4. SAME—ARGUMENT OF COUNSEL.

Where, on the trial of an action for a personal injury, on objection by defendant to the argument made to the jury by plaintiff's counsel relating to the measure of damages, the judge directed the argument to proceed, stating that he would endeavor to cure the matter by his charge, and it does not appear from the record on appeal that the subject was again mentioned by court or counsel, and it was not urged by defendant as a ground for new trial, it must be presumed that the matter was not regarded as prejudicial, and it will not be held ground for reversal.

5. MASTER AND SERVANT—RAILROADS—DUTY TO INSPECT CARS.

The duty of a railroad company to make a reasonable inspection of cars which its employees are required to use and handle, whether its own or those of another company, is a positive one, which it owes to the employees; and for the failure of inspectors, to whom it has delegated such duty, to make a proper inspection, it is liable to an employee who is required to handle a defective car and is thereby injured, where, by reason of his employment or the circumstances of the case, he has no full opportunity to observe the defect.[a]

[a] As to duty of railroad companies to furnish safe appliances, see note to *Felton* v. *Ballard* (37 C. C. A., 8).

6. SAME—INJURY OF SERVANT—CONTRIBUTORY NEGLIGENCE.

Plaintiff was night foreman in the switch yards of defendant railroad company. About 10 o'clock at night certain flat cars of another road arrived in the yards, and were inspected by the regular inspectors, after which plaintiff had an engine attached thereto and started to move them. After they had started and were moving slowly, he observed that a brake was set on one car, and, climbing on the next car, he started to step from one to the other, reaching forward and taking hold of the brake wheel as he did so. The nut was gone from the top of the brake rod, and the wheel came off, causing him to fall between the cars, and he was run over and his arm crushed. *Held*, that he could not be said, as a matter of law, to have been guilty of contributory negligence in failing to examine the brake, under the circumstances.

In error to the circuit court of the United States for the southern district of Mississippi.

This is an action to recover damages for personal injuries, brought by E. T. Clements against the New Orleans and Northeastern Railroad Company, a corporation created under the laws of the State of Louisiana, and tried before the circuit court and a jury, in which a verdict and judgment were rendered against the defendant for $12,500. There was a motion by the railroad company for a new trial, which was overruled, and thereupon this writ of error was sued out. The defendant in error, Clements, was an employee of plaintiff in error in its Meridian yards, in the capacity of night yard foreman. It was his duty to place cars coming into Meridian on tracks or sidings where they belonged, according to the course of business of the company. The company had certain inspectors in the yard, whose duty it was to inspect all cars as they came in, and it was Clements's duty to handle such cars after they had been inspected. He had an engine and crew under him to assist in handling these cars. On the night of October 15, 1897, a train of flat or gondola cars, loaded with gravel, consigned to Meridian, reached Meridian on the Alabama Great Southern Railroad about 9 o'clock p. m. These cars were immediately inspected by the inspectors, and about 11 p. m. Clements proceeded to place the cars on their proper track. For this purpose he had the engine coupled to the cars, and on signal by him the engine pulled the cars forward. Clements, having first cut the cars intended to be moved from other cars to which they were coupled, started forward the way the cars were moving—walking along the south side of the cars. Noticing that a brake on one of the cars—a flat car belonging to the Alabama Great Southern Railroad Company—was "set up," and that the car was jerking along impeded by the brake, he, in pursuance of his duty, climbed on front of the adjoining car in order to let the brake off. Having reached the platform of the connecting car, the cars then being slowly moving, he turned and stepped from that car forward to the end of the next car, where the brake was, at the same time reaching forward and taking hold of the brake wheel. The wheel of the brake came off, and Clements fell backward and against the end of the car from which he had just stepped, and thence to the ground, on the right side of the train—the side opposite to that from which he had climbed—and his left hand fell across the rail and was run over and so injured that it had to be and was amputated. It transpired that the nut which belongs on the top of the brake rod was absent, and there was evidence that it had been off a day or two. This nut is for the purpose of holding the brake wheel on, and the brake wheel came off because of the absence of this nut. The action was predicated upon the alleged negligence of the company in not properly inspecting the car, the plaintiff alleging that he was exercising due care. The railroad company, in defense of the action, denied the alleged negligence, and also denied that the plaintiff was in the exercise of due care, and pleaded certain rules of the company which it claimed made it the duty of

Clements to inspect the brake wheel, and averred that Clements had ample time and opportunity to so inspect said brake as to have discovered said defect and thus guard himself against injury, and that plaintiff was guilty of contributory negligence.

John W. Fewell, for plaintiff in error.
Hoke Smith, for defendant in error.
Before PARDEE, MCCORMICK, and SHELBY, *Circuit Judges*.

PARDEE, *Circuit Judge* (after stating the facts as above). The first assignment of error is based upon the following:

On the cross-examination of plaintiff, E. T. Clements, the counsel of defendant asked the said Clements, who was testifying in his own behalf, the question, "Now, Mr. Clements, didn't you get a large sum of money ($4,000 or $5,000) from an accident insurance company, on a policy on your life and limb, at that time?" Which question was objected to by the plaintiff's counsel as irrelevant and immaterial. The court sustained said objection, to which the defendant then and there, in open court, and in the presence of the jury, excepted.

The bill of exceptions does not show for what object the question was asked nor how it was connected with any of the facts in the case. Our attention is called to no plea which made any such evidence material.

The second assignment of error is based on the following:

On the redirect examination of the plaintiff, Clements, by the plaintiff's counsel the following question was asked: "What else was there for you to take hold of, to steady yourself as you crossed from one car to the other, except the top of this?" (meaning the brake wheel). This question was objected to by defendant, the objection overruled, and defendant excepted. The witness answered, "Nothing else, sir."

The bill of exceptions does not show any ground of objection. There is no statement of evidence showing, or tending to show, what, if any, connection the question bore to the other facts in the case. We find in another bill of exceptions that the plaintiff, Clements, gave evidence tending to show how he received his injury—that it was in climbing from one car to another and using a brake wheel to support himself—in connection with which this question may have been admissible.

The third assignment of error is to the effect that the court erred in sustaining the objection of the plaintiff to the introduction of rule 242, as follows:

Rule 242. Rules for freight brakemen. They are charged with the management of the brakes and the proper display and use of train signals. They must examine and know for themselves that the brakes, ladders, running boards, steps, etc., which they are to use are in proper condition, and, if not, put them so or report them to the proper parties and have them put in order before using.

The bill of exceptions shows that the plaintiff objected to the introduction of this rule as irrelevant and immaterial to the issues, and the court sustained the objection. By its terms the rule is for the government of freight brakemen. The plaintiff in the case was a yard fore-

man, not ordinarily called to do a brakeman's duty, but in the instant case incidentally called to let off a certain brake. As to him, and the duties which he was called upon to perform, the rule is inapplicable, and its introduction could have in no wise benefited the plaintiff in error, but might have misled the jury. If the rule had any special application, the bill of exceptions should have set forth the facts showing such application. We can not infer them, nor are we called upon to search the record for evidence upon which to sustain the objection.

The fourth assignment of error is that the court erred in overruling the objection of the defendant in the court below to the several questions, numbered 1 to 12, inclusive, asked on the cross-examination by plaintiff of the witness W. S. Orr. In regard to this matter the bill of exceptions shows the following:

Upon the recross-examination of the witness, W. S. Orr, he was asked by the plaintiff's counsel the following questions: "By Mr. Smith: Q. You had been working in that yard a good many years, hadn't you?—A. About four years, or three and a half. 1 Q. Don't you know, Mr. Orr, the fact is that men handle the cars after they are turned over to them—use them—without inspection there, and had habitually done so? (Objected to by the defendant. Objection overruled, and the defendant excepted.) 2 Q. I will ask you another question: Is it not true, Mr. Orr, that, outside of the inspectors, that the other employees in your yard at Meridian prior to the time when Mr. Clements was hurt, and for a long time prior to that, did not undertake to inspect the tools and machinery for their use to see to its condition? (Objected to by the defendant. Objection overruled and defendant excepted.) A. I don't exactly understand what you mean. 3 Q. I read you this rule, and I will ask you if this is not true: That that, as a rule, was entirely disregarded and abrogated in your yard: 'Employees of every grade are warned * * *.' Is it not true, now, that the ordinary hands in the yard there who were handling the brakes—handling the cars—didn't undertake to examine them and didn't undertake to see that they were in proper condition, but relied upon the inspection of the inspectors?—A. Yes, sir; I think so. Q. That is true, isn't it?—A. Yes, sir. 4 Q. Isn't it true that—— A. In some cases they did and in some they didn't. 5 Q. Well, now, in what cases?—A. Well, sometimes they would take a train and go off with it, and they don't care if it was inspected or not. 6 Q. Well, I was talking about the yardmen.—A. Well, that is the same thing. 7 Q. They would sometimes take a train before you inspected it?—A. Yes, sir. 8 Q. Isn't it true that they did not undertake—the separate employees—to inspect for themselves?—A. Yes, sir; that is right. 9. Q. They never did that?—A. No. 10 Q. They were never required to do that in that yard, were they?—A. Not that I know of, they weren't. Mr. Smith: 11 Q. What you stated was, as I understood you, in point of practice the men actually handling the trains didn't undertake to do any inspecting?—A. None at all that I knew of, they didn't. Q. And you had been there how many years?—A. Three and a half. Q. Prior to this accident?—A. Yes, sir." To each one of said questions, numbered 1 to 12, both inclusive, when each was asked, and to the answers thereto, the defendant then and there objected, and said objections were each overruled by the court, and the answers thereto permitted to go to the jury, to which several rulings the defendant then and there excepted. The said questions and answers being of the same nature and eliciting answers directed to the establishment of the same point, they are not set out separately, but exceptions were separately taken.

The ground of objection to these questions is not set out. We are not informed what the direct examination of the witness was, and we are left wholly to inference as to whether the cross-examination was upon matters brought in chief, or was entirely independent thereof.

The fifth assignment of error is that the court erred in overruling the objection of defendant to the questions put by plaintiff belowto his witness, A. Moritz, as to whether any rule was in force in the yard, prior to Clements's injuries, which required the men other than inspectors to inspect machinery, and as to what knowledge witness has as to whether foreman and men undertook to inspect each piece of machinery before using it, and whether they relied in practice upon the inspection already made, and whether witness, as a superior officer of men, knew and approved of men not making inspection, and that the train master was often in the yard and saw how it was done. The bill of exceptions shows that the objection to Mr. Moritz's evidence was general, no reason being given, and we are unable to form an opinion as to whether or not it was admissible under the pleadings and evidence in the case. The same may be said as to the sixth exception, relating to the same witness's evidence, except to the question what length of time it would take a brakeman to examine the fixtures of each brake. The objection made was that it was a matter of opinion. If the question was otherwise proper—and we presume it was—we fail to see anything in the particular objection made.

The seventh assignment of error reads as follows:

> The court erred in refusing to give to the jury the instructions requested by defendant, and numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14, which said instructions are set out in the special bill of exceptions No. 2, herewith presented and referred to.

Our rule 11 (31 C. C. A., cxlvi; 90 Fed., cxlvi) provides that when the error alleged is to the charge of the court the assignment of errors shall set out the error referred to in *totidem verbis*, whether it be in the instructions given or in the instructions refused. In *Gallot v. United States* (87 Fed., 446; 31 C. C. A., 44) this court held:

> By the twenty-third and twenty-fourth assignments of errors we are informed that the court below erred in its charge given to the jury in each portion thereof marked by lines in said written opinion, and marked 1, 2, 3, 4, 5, 6, 7, 8, and 9, and shown in the bill of exceptions No. 5, and the court erred in refusing each of the several charges and instructions in Nos. 2 and 5, as shown in the bill of exceptions. * * * The assignments of errors Nos. 19, 20, 23, and 24 being in violation of the above rules 10 and 11 of this court, we decline to examine and pass upon the questions attempted to be raised thereby (87 Fed., 447, 448; 31 C. C. A., 45, 46).

See *Distilling Co. v. Rheinstrom* (30 C. C. A., 10; 86 Fed., 244); *Grape Creek Coal Co. v. Farmers' Loan and Trust Co.* (12 C. C. A., 350; 63 Fed., 891); *National Bank of Commerce of Kansas City v. First Nat. Bank of Kansas City* (10 C. C. A., 87; 61 Fed., 809); *Haldane v. United States* (16 C. C. A., 447; 69 Fed., 819.)

The eighth assignment of error is that the court erred in denying the motion of defendant to exclude the evidence adduced by the plaintiff and render a judgment for the defendant. This assignment of error does not appear to be insisted upon, and is, under the evidence in the case as set forth in the bill of exceptions, evidently not well taken.

The ninth assignment of error is based upon the following proceedings:

Be it remembered, that on the trial of this cause on the 18th day of March, 1899, at a regular term of said court, before the court and jury, Mr. Hoke Smith, of counsel for plaintiff, making the concluding address to the jury, among other things, spoke in his said address to the jury as follows: "It [referring to tables of expectations offered in evidence] don't mean that all men will die at 66, or that any one man will die at 66, but it means that the average length of life of men 33 years old is thirty-three years more. Some may stretch it to 80 or 85, some may drop by the wayside at 40 or 35, but the average life of a man 33 years old is thirty-three years more. Now, we have no power of prophecy. We are unable to tell how long Mr. Clements will live, but can with reasonable accuracy act upon his life by saying we will allow him the average life of a man 33 years old. That is what the law allows me to put this table in for—to give the average life of a man 33 years of age, so you can, in estimating his loss, estimate by the average. Now, gentlemen of the jury, under this proof his average loss is $840 a year for thirty-three years. That would run up into the neighborhood of $30,000; but I don't claim, gentlemen of the jury, that he is entitled to multiply his losses for the year with the number of years, because if he lived the thirty-three years he would have gotten this sum year by year until the end of the time, and the amount that is paid under your verdict is paid in cash, and it would not be right to ask you to give him the same. You have to give him what is termed the 'present value' of the money. What is the present value of a yearly payment of $840 a year for thirty-three years? Now, the present value of $1 for thirty-three years, at 6 per cent is about $13. The present value, therefore, of $840 for that length of time would be 840 times $13, or about $11,000. That part of his recovery is capable of mathematical estimation, and is not left to your discretion."

(The defendant here interposed an objection to the line of argument, because it is not based upon a correct theory of the law. Defendant thereupon moved the court to instruct the jury to disregard the argument.)

The COURT. Proceed with the argument.

Mr. FEWELL. You overrule my motion? (No reply.) I do not admit he is entitled to any amount. I do not find, if your honor please, where any rule is positively laid down——

The COURT. Proceed with the argument of the case. I will endeavor to cure this thing when I instruct the jury.

The defendant then and there, in the presence of the jury, by its counsel, excepted to the action of the court above set out, and tenders this, its bill of exceptions, which is signed and sealed, and made part of the record, this 9th day of May, 1899.

H. C. NILES, *Judge.*

From these proceedings, we take it that the trial judge expressed his disapproval of the line of argument pursued, and said, "I will endeavor to cure this thing when I instruct the jury." Whether he did further express his disapproval to the jury can be determined

only by inference. Another bill of exceptions purports to give the oral charge of the judge to the jury in connection with eighteen requested instructions. Neither in the oral charge nor in the requested instructions is any mention made of the question of or amount of damages, or the rules to be observed by the jury in determining the same. Nowhere is it stated that these requests or instructions were the only instructions asked or acted upon by the court. It may well be that in some instruction given to the jury the judge gave the proper rule for damages, and carried out his suggestion that he would cure the matter as to the line of Mr. Hoke Smith's argument. Assuming, however, as may be the fact, that nothing further was said about it, on the showing made we are unable to say that the action of the court in relation to Mr. Smith's argument constitutes reversible error. Counsel for plaintiff in error relies upon the decision of this court in *Railroad Co.* v. *Carroll* (28 C. C. A., 207; 84 Fed., 778, 781, et seq.), in which case a very similar, though much more objectionable, argument was presented to the jury. The record in that case will show that the trial judge expressed no disapproval whatever of the argument used, nor undertook in any way to correct the effect of the same. In the opinion in that case the court said:

> We understand the general rule to be that the remarks of counsel to the jury on the merits, to constitute reversible error, must be objected to at the time, be unwarranted by the pleadings and evidence, have a tendency to mislead or prejudice the jury, and be, to more or less extent, approved by the trial judge.

In the instant case there is nothing to show whether or not the remarks complained of were warranted by the evidence, but the case does show that the remarks were more or less disapproved of by the trial judge, and, if there was error on the part of the trial judge, it was because he did not thereafter instruct the jury as to the proper weight to be given to the argument in question; and in this regard, as counsel for the defendant apparently made no further suggestions to the judge in relation thereto, nor asked any special instruction thereon, we are inclined to the opinion that the matter was considered of so little importance, in view of the main issues in the case, that it escaped the attention of both the judge and the counsel. The matter was not considered of sufficient importance to urge with other grounds in the motion for a new trial, and we are confident that, in view of the large verdict, both the counsel and the trial judge would have laid great stress on any matter of record appreciably tending to show prejudice on the part of the jury in the matter of damages.

The tenth and eleventh assignments of error complain of certain rulings on demurrers, but are not insisted upon, at least no argument is submitted in support of them. The twelfth assignment of

error complains of the overruling of a motion for a new trial, and needs no notice.

This disposes of all the formal assignments of error, and practically disposes of the case; for, upon the real question presented, and which has been very elaborately and ably argued by counsel for plaintiff in error, we do not agree with his contention. The record shows that the plaintiff in error (defendant below) requested the court to charge the jury, among other things, the following propositions:

It appearing that the usual and proper inspection was made of the car by competent inspectors, the action fails, and the jury will find for the defendant. Under the law, the railroad company was not the insurer or guarantor of the life or limb of the plaintiff. The only duty it owed to him was to use ordinary and reasonable care to guard him against danger and, if the railroad company used such care in this case, the law is with the railroad company, the defendant, and the jury will so find; that is, a verdict, "We, the jury, find for the defendant." This suit is based on the charge that the defendant railroad company was guilty of negligence and, unless the testimony shows that it was guilty of negligence in not discovering the absence of the nut, the jury will find for the defendant. The inspectors were not bound to the most careful or strictest inspection, but only to ordinary and reasonable care under the circumstances. It is the duty of the railroad company to exercise ordinary care in furnishing reasonably safe cars and other appliances, and also to exercise ordinary care in their inspection, so as not to unreasonably expose its employees to unknown and extraordinary hazards. A railroad company is not required to furnish cars or appliances that are absolutely safe, or to maintain them in that condition. The company is not an insurer of the safety of the employee against injury. The company is not liable for injuries caused by defects of which it had no knowledge, and of which it could not have known by the exercise of ordinary care. The company is only charged with knowledge of that which by the exercise of ordinary care it would have discovered. It is not required to resort to tests that are impracticable or oppressive and unreasonable, or which would be incompatible with the proper furtherance of business, and which are only required to insure absolute safety. If the duty of inspection has been performed with ordinary care, and the defect is found afterwards to exist, but is not discovered at the time, the master is not liable for an injury caused thereby, unless he had knowledge of such defect. The inspection which the company is required to make of cars from other roads is not merely a formal one, but should be made with ordinary care; that is, the inspection should be such as the time and place, means and opportunity, will permit.

The rule sought to be presented by these instructions and charges is that, while it is the duty of the railroad company to make proper inspection and look after the condition of cars that it calls upon its employees to use, when the railroad company has appointed proper and capable inspectors, and provided by its rules that these inspectors shall make due and proper inspection, and the inspectors have made inspection, then the duty of the railroad company is performed, and no negligence can be imputed to the company because the inspection has not been thorough and complete. In *Railroad Co.* v. *Herbert* (116 U. S., 642, 652; 6 Sup. Ct., 590, 595; 29 L. Ed., 755, 760) the court say:

If no one was appointed by the company to look after the condition of the cars, and see that the machinery and appliances used to move and to stop them were kept

in repair and in good working order, its liability for the injuries would not be the subject of contention. Its negligence in that case would have been in the highest degree culpable. If, however, one was appointed by it charged with that duty, and the injuries resulted from his negligence in its performance, the company is liable. He was, so far as that duty is concerned, the representative of the company. His negligence was its negligence, and imposed a liability upon it, unless as contended, it was relieved therefrom by the statute of Dakota.

Railroad Co. v. *Herbert* (*supra*) has been affirmed and followed by the Supreme Court in many cases. See *Railroad Co.* v. *McDade* (135 U. S., 569; 10 Sup. Ct., 1044; 34 L. Ed., 235); *Railway Co.* v. *Cox* (145 U. S., 593; 12 Sup. Ct., 905; 36 L. Ed., 829); *Railroad Co.* v. *Hambly* (154 U. S., 357; 14 Sup. Ct., 983; 38 L. Ed., 1009).

In *Railway Co.* v. *Barrett* (166 U. S., 617, 619; 17 Sup. Ct., 707, 708; 41 L. Ed., 1136, 1139) the following charge was indorsed:

A railway company is bound to use ordinary care to furnish safe machinery and appliances for the use of its employees, and the neglect of its agents in that regard is its neglect. That it is not bound to insure the absolute safety thereof, nor to apply the best and safest and newest of such mechanical appliances, but is bound to use all reasonable care and prudence in providing machinery reasonably safe and suitable for use, and in keeping the same in repair. That "by 'ordinary care' is meant such as a prudent man would use under the same circumstances. It must be measured by the character and risks of such business. And where such persons, whose duty it is to repair the appliances of the business, know, or ought to know by the exercise of reasonable care, of the defects in the machinery, the company is responsible for their neglect."

In *Railroad Co.* v. *Mackey* (157 U. S., 72, 87; 15 Sup. Ct., 491, 496; 39 L. Ed., 624, 630) the court said:

The corporation is not to be held as guaranteeing or warranting the absolute safety, under all circumstances, or the perfection in all its parts, of the machinery or apparatus which may be provided for the use of employees. Its duty in that respect to its employees is discharged when, but only when, its agents whose business it is to supply such instrumentalities exercise due care as well in their purchase originally as in keeping and maintaining them in such condition as to be reasonably and adequately safe for use by employees.

In *Railway Co.* v. *Daniels* (152 U. S., 684, 689; 14 Sup. Ct., 756, 758; 38 L. Ed., 597, 601) after defining the risks assumed by a servant, the court said:

But, within such limits, the master who provides the place, the tools, and the machinery owes a positive duty to his employee in respect thereto. That positive duty does not go to the extent of a guaranty of safety, but it does require that reasonable precautions be taken to secure safety; and it matters not to the employee by whom that safety is secured, or the reasonable precautions therefor taken. He has a right to look to the master for the discharge of that duty, and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employee, or the latter's right to insist that reasonable precaution shall be taken to secure safety in these respects.

See also *Railroad Co.* v. *Baugh* (149 U. S., 388; 13 Sup. Ct., 94; 37 L. Ed., 772).

It is the duty of the railroad company to use reasonable care to see that the cars employed on its road, both those which it owns and those which it receives from other roads, are in good order and fit for the purposes for which they are intended; and this duty it owes to its employees as well as to the public. (*Railway Co.* v. *Archibald*, 170 U. S., 665; 18 Sup. Ct., 777; 42 L. Ed., 1188.)

In the light of these decisions we understand the law to be that as to patent defects in machinery furnished by railroad companies for the employees to use the railroad companies are insurers in all cases where the employee, by reason of his employment or the circumstances of the case, has no full opportunity before using the machinery in question to observe and note the patent defect, and the rule is the same with regard to all defects that can be discovered on proper examination and inspection.

In the present case the defendant in error was not called upon by his duty to make any particular inspection of the cars turned over to him after the regular inspection. As to the particular defect which resulted in his injury, the proof is clear that although the defect was patent, and could and would have been readily noticed by any employee called ordinarily to use the same, the defendant was called upon to use it at night, in an emergency, and without opportunity to examine or inspect the same. It may be, as counsel for plaintiff in error argued, that he knew that the car had lately come in from another road; that after he reached the platform of the car he could, with the slightest movement of his hand or instantaneous movement of his lantern, have discovered the condition of the brake (that is, the absence of the nut); and that upon that discovery he could have used the brake ("let it off") in such a way that he would not have been injured. But the trouble is he had no opportunity to examine the condition of the brake with his hand or by any movement of the lantern. In the line of his duty he was climbing on top of the car as it was moving, and he reached for and caught the brake to support himself preparatory to using the same; and to say, under such circumstances, that he should have made a preliminary inspection, is contrary to both reason and authority. On the whole case—and we have examined it with great care—we are constrained to hold that the record shows no reversible error on the trial, and the judgment must be affirmed.

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DEFECTIVE SAFETY APPLIANCES.

DECISION OF NEW YORK SUPREME COURT.

CRAWFORD v. NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

(Supreme Court of New York; Trial Term, Westchester County, April term, 1901.)

[Reported in 10 American Negligence Reports, 166, and reprinted by permission of Messrs. Remick & Schilling.]

1. *Brakeman injured coupling cars—Statutory requirement as to automatic couplers and brakes—Act of Congress—Construction—Violation of statute—Liability of railroad company.*—The violation by a railroad company of the Federal safety appliance act may be considered by a jury of a State court on the question of whether a railroad company was negligent, so far as its duty was concerned, toward a brakeman who was injured while coupling cars which were not equipped as required by the statute.
2. If a railroad company engaged in interstate commerce permits to be hauled on its road any cars not equipped as the Federal statute provides, even though they belong to other companies, such railroad company offends against the provisions of the statute.
3. The Federal safety appliance act is intended to protect brakemen against the dangers of their work, so far as it can, and it applies to interstate commerce cars which are being made up in the yard to start out on the road as well as to such cars when they are actually moving along between the States.
4. The violation, by a railroad company, of an act of Congress entitled "An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes" may be considered by a jury on the question of whether a railroad company was negligent, so far as its duty was concerned, toward a brakeman who was injured while coupling cars which were not equipped as required by statute.[a]

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[a] *Act of Congress requiring common carriers to equip their cars with automatic couplers and continuous brakes.*—The Federal statute upon which the above case was brought was passed by Congress March 2, 1893, chapter 196, and took effect by the provisions of the statute January 1, 1898, although the Interstate Commerce Commission had authority by the terms of the act to extend the period in which to comply with it, which power, to a limited extent, was exercised with reference to some of the equipments required to be used.

This, the pioneer construction put by the learned trial judge, Mr. JUSTICE DICKEY presiding, upon the provisions of this act, is of exceptional interest to the bench and bar, and, because of the national character of the act construed, has a wide and far-reaching application. Although the construction is in the form of a charge, yet the

Action by Frank Crawford against the New York Central and Hudson River Railroad Company. Tried in Westchester County, New York, Mr. Justice Dickey, presiding. Verdict and judgment for plaintiff.

Tyndall and Barton, for plaintiff.
Charles C. Paulding, for defendant.

DICKEY, J., charged the jury as follows:

GENTLEMEN: The Congress of the United States, in the year 1893, in its wisdom, passed a law dealing with the railroads of the United States; that is, such of the railroads as ran from one State into another that dealt in interstate commerce, as it is called, by which is meant going from one State to the other in the course of the business of the railroad company. This act is entitled "An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes;" and section 2 of that law, which, by the way, did not go into effect until some five years after its passage, giving that period of time to enable the companies to change from the old system to the new, provides "that on and after the 1st day of January, 1898, it shall not be lawful for any such common carrier, to wit, a common carrier engaged in interstate commerce, by a railroad, to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the car." So you will see that this provision of the law is double in its requirements, in that the coupling must be worked automatically by impact and without the necessity of men going between the ends of the cars.

Now the plaintiff claims that the defendant railroad company did not comply with this United States statute at a time after it went into force and operation; that, on the contrary, it used in interstate traffic cars that would not couple one with the other automatically; that would not couple without the necessity of a brakeman going between the ends of the cars to couple them, but needed the using of the link and pin, which the plaintiff claims were given to him for that purpose.

Now, the defendant says it was not the owner of these cars, and counsel has argued that that is a defense to the action. I say to you, as matter of law, that has nothing to do with the cause of action at all. It does not matter whether the defendant was the owner or not,

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lucid and thorough exposition of the statute by the learned judge is of much interest, especially in view of the further fact that the defendant fully acquiesced in the soundness of its judicial construction by failure to challenge its correctness on appeal, and the payment by it in full of a large judgment, based upon the verdict rendered in accordance therewith.

because the statute prohibits the use on the line of the road or the permitting to be hauled on the line of the road, any of these cars not equipped as the statute provides. So that if they permitted to be hauled or used on their roads any such cars, even though they belonged to other companies, they would offend against this provision of the statute. The other claim of the defense is that as to these particular cars they were not in use for interstate commerce, because they were not on the road in matter of transit at the time, but were in the yard itself. As to that, I charge you if the cars were cars engaged and being used in interstate commerce, it matters not whether they were being made up in the yard or were moving at the time out on the road, because the statute is intended to protect brakemen against the danger of such work, so far as it can protect them against such dangers, and it matters not whether interstate commerce cars were being made up to start out on the road or whether they were actually moving along between the States at the time, so far as the purpose and intent of the statute is concerned. In fact, in the making up, there is more necessity for the brakemen to be at their work, coupling the cars, bringing them together, than in the operation of the cars after they once start out from New York, for Boston, New Haven, Chicago, or elsewhere.

Now, if you find that the defendant has violated this statute, you may consider that on the question of whether it was negligent, so far as its duty was concerned, as regards this plaintiff. If you find it was thus negligent and that the plaintiff himself was free from all negligence contributing to his injury, then you will give him such reasonable sum by way of compensation as will make good to him the money he has lost by reason of the time that he has been out of employment growing out of the injury, and for his pain and suffering, and for any injury that has come to him by reason of this accident, provided you find the wrong was done as claimed in the complaint.

Verdict and judgment for plaintiff.

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ELMORE v. SEABOARD AIR LINE RY. CO.

(Supreme court of North Carolina, June 13, 1902.)

[Reprinted from Southeastern Reporter, vol. 41, p. 786, by permission of the West Publishing Co.]

INJURIES TO SERVANT—RAILROADS—AUTOMATIC COUPLER—DEFECTS—CONTINUING NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

1. Where the automatic coupler on a car has been out of repair for such a length of time that it might have been repaired, and a brakeman coupling cars in the discharge of his duty is injured, which he would not have been had the coupler been in order, the railroad is guilty of negligence. Per CLARK and DOUGLAS, JJ.

2. The negligence is continuing and cuts off the defense of contributory negligence. Per CLARK and DOUGLAS, JJ.

COOK and MONTGOMERY, JJ., dissenting.

Appeal from superior court, Wayne County; Allen, judge.

Action by Henry J. Elmore against the Seaboard Air Line Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Day & Bell, *J. B. Batchelor*, and *T. B. Womack*, for appellant.
Allen & Dortch and *I. F. Dortch*, for appellee.

CLARK, J.:

This case is simply a repetition of Greenlee *v.* Railway Co., (122 N. C., 977; 30 S. E., 115; 41 L. R. A., 399; 65 Am. St. Rep., 734), Troxler *v.* Same (124 N. C., 191; 32 S. E., 550; 44 L. R. A., 313; 70 Am. St. Rep., 580), and the several cases affirming the doctrine therein laid down. It was in evidence that the defendant's cars were equipped with automatic couplers, but where the plaintiff was injured in making a coupling there was evidence that the automatic couplers had been out of repair five months or more to the knowledge of defendant.

The plaintiff testified that he was ordered to make a coupling, and was injured in so doing. He testified: "If the coupler had been in perfect condition I would have been able to couple without putting my foot between there" (the cars); "if the link had been in perfect condition I would not have had to kick it;" and much other evidence to the same purport, that he used his foot instead of his hand, because, the coupler being out of order, and no stick being furnished him, he could only make the coupling which the conductor ordered him to make by using his foot or hand, and he had more power in his foot; that he

had seen his conductor use his foot to couple in that way, and the conductor had seen him and others do so. The judge charged the jury substantially that, if the coupler was in repair, the defendant was not guilty of negligence; or if the lack of repair of the coupler did not necessitate the plaintiff going between the cars to couple, there was no negligence on the part of defendant; but that, if the coupler was out of condition for such length of time that the defendant could have had it repaired, but failed to do so, and that plaintiff would not have been injured but for the condition of the couplers, and that in the condition in which the coupler was it was necessary, in order to couple, to use the hand or foot, and that the plaintiff was under the orders of the conductor, who directed him to couple the cars, and in so doing plaintiff was injured; and if the jury further find that he would not have been injured but for the condition of the couplers then the jury should find the first issue "Yes." On the second issue the court instructed the jury that if the coupler was out of repair, and had been for such length of time that the defendant knew or should have known it, and with the exercise of reasonable diligence could have had it repaired, and the plaintiff coupled the cars under the direction of the conductor, and that it was plaintiff's duty to obey the conductor, and he would not have been injured but for the condition of the coupler, to answer the second issue (contributory negligence) "No."

The charge was much fuller, and put every phase of the evidence which was favorable to the defendant, but the above presents the real point involved in the numerous exceptions. This proposition is settled in the cases above cited, to wit, it is the duty of the defendant to use automatic couplers, and if, on failure so to do, injury occurs to an employee, which would not have happened if there had been a coupler, this is a continuing negligence on the part of the employer, which cuts off the defense of contributory negligence, such failure being the causa causans. If the automatic coupler was out of repair for a length of time reasonably sufficient to have it repaired, and this was not done, it was the same thing as the failure to have the automatic coupler on that car. Without reiterating the reasoning which has induced the court to make and abide by this ruling, and applying it to the case in hand, the judgment below must be affirmed.

DOUGLAS, J., concurs in result.

COOK, J. (dissenting):

I do not concur with the opinion of the court. Plaintiff was instructed by the conductor to go back and couple the cars while he went to the office to get orders. The caboose was standing upon the main track. The box cars to be coupled to the caboose were upon the side track. Afterwards, the box cars were put in motion by being "kicked," and had rolled from the side track upon the main track, and approaching the caboose to which they were to be coupled. The

couplings upon these cars were "automatic." Upon the caboose car the link which connected the drawer pin to the lever had been taken out, so that if the lip were shut it had to be opened with the hand. Plaintiff, as well as defendant, knew that this link was out.

As the box cars approached the caboose plaintiff saw that the lip was closed and knew that the coupling could not be made until the lip was opened, and to do this he would have to raise the drawer pin with one hand and then open the lip. "I (he) looked at the other cars (the ones approaching) and saw that the bumper on them (it) was not open, but was closed. * * * I did not know these cars were coming so fast. I put my foot down there and as the cars came up with such rapidity they caught my foot. * * * It was caught on the rebound." It is not contended that it was negligence in giving the plaintiff the order to couple the cars. At the time the order was given the cars had not been "kicked" or put in motion. The conductor did not know nor did the plaintiff at that time that the lip was closed, so plaintiff was not ordered to do a dangerous act or to assume the risk of any danger.

When plaintiff discovered that the coupling could not be made because the lip was closed, the box cars were approaching very near to the caboose. It was not his duty, then, to go in between the moving cars. It was against the rules. Upon a failure to make the coupling the cars could have been stopped, and then the couplers could have been properly adjusted and the coupling made with safety. The conductor's order to go back and couple the cars did not impose upon plaintiff an obligation to do so at a hazard or to take any risk. Had the lip been open—its usual condition—the coupling would have been made; but, being closed and discovered so to be just as the cars were coming together, plaintiff should have waited until the cars stopped and then adjusted the couplers.

But he chose to do the foolish rather than the prudent thing, which could not have been anticipated or prevented by defendant. Therefore I think the court erred in not instructing the jury that upon the whole evidence they should answer the second issue, to wit: "Did the plaintiff by his own negligence contribute thereto" (to his injury)? "Yes." Had the conductor been present, seeing the conditions that existed, and then ordered the plaintiff to make the coupling, then and in that event I would concur in the opinion; but such was not the case. It was the duty of plaintiff to look and see the conditions that existed, and from his own testimony it appears that he would not have taken the risk if he had looked and seen, for he says he "did not know these cars were coming so fast." Then, can defendant be responsible for such negligence?

MONTGOMERY, J., concurs in the dissenting opinion.

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DEFECTIVE SAFETY APPLIANCES.

FELTON v. BULLARD.

(Circuit court of appeals, sixth circuit. May 15, 1899.)

[Reprinted from the Federal Reporter, vol. 94, page 781, by permission of the West Publishing Company.]

1. MASTER AND SERVANT—INJURY OF RAILROAD EMPLOYEE FROM DEFECTIVE CARS—OHIO STATUTE.

   Section 2 of the Ohio act of April 2, 1890 (87 Ohio Laws, 149), which makes it unlawful for any railroad corporation to knowingly or negligently use or operate any car that is defective, or upon which any attachment is defective, makes no distinction between the cars owned by the corporation and foreign cars which it may operate, and the duty of proper inspection applies equally to both; and under the further provisions that, if any employee shall receive an injury by reason of any defective attachment, the company shall be deemed to have had knowledge of the defect, and proof of the defect and injury shall be prima-facie evidence of its negligence, as construed by the supreme court of the State. To overcome the presumption of knowledge on the part of the company, raised by the statute on such proof, it is not sufficient to prove that the company furnished a sufficient and competent inspector, but actual and proper inspection, or its equivalent, must be shown.

2. SAME—DUTY OF RAILROAD COMPANY TO INSPECT FOREIGN CARS.

   As a matter of general law, independently of statute, a railroad company owes to its servants engaged in handling or operating foreign cars on its road the legal duty of not exposing them to dangers arising from defects which might be discovered by reasonable inspection before they are admitted into its trains, and for the negligence of an inspector in that regard the master is responsible.

3. SAME—SUFFICIENCY OF INSPECTION.

   A mere visual inspection of the grab irons constituting the ladders on cars, which brakemen are required to use more or less while the cars are in motion, can not be held, as a matter of law, to be a sufficient inspection; and whether an inspection made was in fact a reasonable and sufficient one is a proper question for the jury.

4. SAME—ACTION FOR DEATH OF BRAKEMAN—TRIAL.

   In an action against a railroad company to recover for the death of a brakeman, caused by the breaking from the car of a handhold forming part of the ladder upon which he was descending from a moving car, the testimony of an inspector that he inspected the car on the day before the accident by climbing up the ladder at one end and down that at the other is insufficient to warrant a peremptory instruction for the defendant, where the evidence disclosed that the iron was held to the car at one end only by a piece of a rusted screw half an inch long and imbedded in rotten wood.

In error to the circuit court of the United States for the northern district of Ohio.

Lawrence Maxwell, for plaintiff in error.

Harvey Scribner, for defendant in error.

Before TAFT and LURTON, *Circuit Judges*, and CLARK, *District Judge*.

LURTON, *Circuit Judge*.

Edward McCarn, a brakeman in the service of the plaintiff in error, was killed while descending from the top of a moving car, by reason of the defective character of a grab iron, which broke off and threw him beneath the wheels. This grab iron was attached to the end of a foreign car which belonged to the Grand Trunk Railway Company, which had been received the day before from a connecting railway company. *The grab iron was of the usual construction and had been* attached to the end of the car in the usual way by two screws, each of from 3 to 4 inches in length, one being at each end of the iron. An examination after the accident disclosed the fact that one of these screws was badly rusted and had long been broken, so that it supported one end of the iron by a stub only one-half inch in length, which rested in wood much decayed. The screw at the other end appeared to have been freshly broken or wrenched in two, a part being pulled out with the grab iron when it came off the car. That this defective grab iron was the direct cause of the death of the intestate was not disputed. It constituted an attachment upon a car at the time being operated by the receiver upon a line of railway within the State of Ohio.

The Ohio act of April 2, 1890, so far as it bears upon the facts of this case, furnishes a rule of law which must govern its disposition. The second section of that act makes it unlawful for any railway corporation to knowingly or negligently use or operate any car that is defective or upon which any attachment thereto belonging is defective. It also provides that if an employee of any such corporation shall receive any injury by reason of any defective attachment thereto belonging, the corporation "shall be deemed to have had knowledge of such defect before and at the time such injury was so sustained," and that when the fact of such defect shall be made to appear by such employee or his legal representatives in an action against any such railroad corporation for damages on account of such injuries so received, the same shall be "prima-facie evidence of negligence on the part of such corporation." (87 Ohio Laws, 149.) This section of this statute recognizes no distinction between the liability of a railway company for injuries sustained by its employees through the operation of defective cars owned by such corporation and injuries sustained from defects in foreign cars. The statute applies to cars "owned and operated, or being run and operated by such corporations." The liability is the same in either case. How, then, may this prima-facie evidence of corporate negligence be rebutted? Prior to the passage of this act the decisions of the supreme court of Ohio were to the effect that a

railroad company was not liable to a brakeman for the negligence of a car inspector, it being held that the brakeman and the inspector were fellow-servants. (*Railroad Co.* v. *Fitzpatrick*, 42 Ohio St., 318; *Railroad Co.* v. *Webb*, 12 Ohio St., 475). The third section of this act changes the law of fellow-servant in the cases to which it applies. That section provides that:

> In addition to the liability now existing by law, that every person in the employ of such company actually having power or authority to direct or control any other employee of such company is not the fellow-servant, but superior of such other employee, also that every person in the employ of such company having charge or control of employees in any separate branch or department shall be held to be the superior and not fellow-servant of employees in any other branch or department who have no power to direct or control in the branch or department in which they are employed.

This section would seem to have no bearing upon the case now to be decided, inasmuch as the inspector employed by the receiver had no subordinates, and had no power "to direct or control any other employee" of the receiver. He was sole inspector, with no power of direction or control and no assistants. The situation is, therefore, unique. The inspector, under the decisions of the Ohio courts, which doubtless constituted a part of "the now-existing law" referred to in this section, was the fellow-servant of the brakeman. This "now-existing law" is not changed by this section, except in so far as specifically provided by this enactment. Conceding, therefore, that the third section has no application to the peculiar facts of this case, we reach the inquiry as to the effect of the second section, which creates a statutory presumption of corporate knowledge of the defect from evidence of its existence and an injury sustained by an employee engaged in operation of such defective car. Is that prima-facie case rebutted by evidence that the railroad corporation had furnished a sufficient and competent inspector? This question finds its answer in the case of *Railway Co.* v. *Erick* (51 Ohio St., 146–162; 37 N. E., 128). One of the questions in that case arose upon the refusal of the trial court to instruct the jury that if the company had employed a competent inspector, whose duty it was to carefully inspect all cars and their appliances before they were permitted to go out, the company would not be liable if he neglected to make such inspection. This, in various forms, was refused. The supreme court held that the presumption of knowledge of the defective condition of the car in question, raised by the proof of the defect and injury, under the second section of the act of April 2, 1890, was not rebutted by proof of the employment of a competent and sufficient inspector. Upon this question the court said:

> The presumption of knowledge of the defect, before and at the time of the injury, is, by the statute, chargeable to the company; and this statutory presumption can not be overcome by proof of facts which only raise a presumption that the company

did not have such knowledge. Competent and careful inspectors are presumed to properly inspect the cars and their attachments, but such presumption would not overcome the statutory presumption of knowledge of defects before and at the time of the injury. It would take an actual and proper inspection, or its equivalent, to overcome the statutory presumption of knowledge of such defects. It will be noticed that this section of the statute also provides that, in the trial of a personal injury case against a railroad company, the fact of such defect in its cars or their attachments shall be prima-facie evidence of negligence on the part of such corporation.

That this section of the statute constitutes a mere rule of evidence, as decided by the same court in *Pennsylvania Co.* v. *McCann* (54 Ohio St., 10; 42 N. E., 768) and *Hesse* v. *Railroad Co.* (58 Ohio St., 167; 50 N. E., 354), is no answer. These cases in no way diminish the weight of the case of *Railway Co.* v. *Erick* (*supra*) as an authoritative construction of the statute, in which it is held that the statutory presumption of knowledge is not rebutted by anything less than evidence that there was "an actual and proper inspection."

Aside from the effect to be given to the second section of the act of 1890, we hold that the duty of inspecting foreign cars is a duty due from the master to his servant, and that the master is responsible to the servant for all defects which would be disclosed by a reasonably careful inspection. The well-known course of business pursued by carriers in this country involves so large a use of foreign cars as to make it inadmissible that any distinction should be recognized between the duty of caring for the safety and protection of employees engaged in operating such cars and that exacted in respect to cars owned or controlled by the carrier. Employees can no more be said to assume the responsibility for injuries due to the defective condition of foreign cars than they can be said to assume the risk arising from defects in domestic cars which might have been discovered by proper inspection. In the one case as much as in the other the inspector is discharging the duty of the master to his servants, and for his negligence in this particular the master is responsible. The question is one of general and not local law, unless controlled by statute. It is, therefore, a question for the courts of the United States to decide upon their own judgment as to the common law controlling the question. (*Railroad Co.* v. *Baugh*, 149 U. S., 368, 13 Sup. Ct., 914; *Railroad Co.* v. *Hambly*, 154 U. S., 349, 14 Sup. Ct., 983.)

To support the contention that, in the matter of the inspection of foreign cars, the inspector is the fellow-servant of the men operating such cars, the cases of *Mackin* v. *Railroad Co.* (135 Mass., 201) and *Coffee* v. *Railroad Co.* (155 Mass., 21; 28 N. E. 1128) have been cited. In *Mackin* v. *Railroad Co.* the court, in discussing the duty of carriers to receive from other companies' cars to be forwarded, said:

The obligation of drawing cars over its road would not extend to such as were in an unsafe condition; but, as to cars so received, the duty of the defendant is, not that of furnishing proper instrumentalities for service, but of inspection, and this

duty is performed by the employment of sufficient, competent, and suitable inspectors, who are to act under proper superintendence, rules, and instructions; and, however it may be as to other cars, the inspectors must be deemed to be engaged in a common employment with the brakeman, as to such cars while in transit, and until ready to be inspected for a new service.

In the later case of *Chandler* v. *Railroad Co.* (159 Mass., 588, 589; 35 N. E. 89), the court declined to extend the exception made in the earlier cases to foreign cars employed in any way by the receiving company for its own uses during the process of forwarding them.

The rule which we deduce as having the support of the weight of authority and reason is that a railroad company owes to its servants engaged in handling or operating foreign cars the legal duty of not exposing them to dangers arising from defects which might be discovered by reasonable inspection before they are admitted into its trains. (*Gottlieb* v. *Railroad Co.*, 100 N. Y., 462, 3 N. E., 344; *Goodrich* v. *Railroad Co.*, 116 N. Y., 398–401, 22 N. E., 397.) In the case last cited the New York court of appeals said:

It was decided in *Gottlieb* v. *Railroad Co.* (100 N. Y., 462; 3 N. E., 344) that a railroad company is bound to inspect the cars of another company, used upon its road, just as it would inspect its own cars; that it owes this duty as master, and is responsible for the consequences of such defects as would be disclosed or discovered by ordinary inspection; that when cars come in from another road which have defects visible or discernible by ordinary examination, it must either remedy such defects or refuse to take them. This duty of examining foreign cars must obviously be performed before such cars are placed in trains upon the defendant's road, or furnished to its employees for transportation. When so furnished the employees whose duty it is to manage the trains have a right to assume that, so far as ordinary care can accomplish it, the cars are equipped with safe and suitable appliances for the discharge of their duty, and that they are not to be exposed to risk or danger through the negligence of their employer.

This rule, as thus stated, was approved and applied in *Railroad Co.* v. *Mackey* (157 U. S., 72–91; 15 Sup. Ct., 491). In concluding a discussion of the question the court, speaking by Justice Harlan, after quoting from *Goodrich* v. *Railroad Co.* the paragraph we have set out above, said:

We are of opinion that sound reason and public policy concur in sustaining the principle that a railroad company is under a legal duty not to expose its employees to dangers arising from such defects in foreign cars as may be discovered by reasonable inspection before such cars are admitted into its trains.

In the later case of *Railway Co.* v. *Archibald* (170 U. S., 665–669; 18 Sup. Ct., 777) the Supreme Court again had under consideration the duty of a railroad company to its servants in respect to foreign cars, and followed the doctrine announced in the case of *Railroad Co.* v. *Mackey*, cited above, saying:

That it was the duty of the railway company to use reasonable care to see that the cars employed on its road were in good order and fit for the purposes for which they were intended, and that its employees had a right to rely upon this being the case,

is too well settled to require anything but mere statement. That this duty of a railroad as regards the cars owned by it exists also as to cars of other railroads received by it, sometimes designated as "foreign cars," is also settled.

That this duty is not discharged by merely furnishing an inspector competent to discharge the duty is very clear, and that this was the holding in both the cases decided by the Supreme Court of the United States and cited above is most apparent from an examination of the facts of the cases, as well as from the language employed by the court in considering the duty as one identical in character with that resting upon the master in respect to the inspection of his own cars before admitting them into its trains. That the master is responsible for the negligence of such an inspector, and that the inspector is not the fellow-servant of those operating such foreign cars, is the necessary conclusion from the character of the duty.

In *Railroad Co.* v. *Herbert* (116 U. S., 642; 6 Sup. Ct., 590) the court held that the inspector was not the fellow-servant of a brakeman who was injured through the negligence of the inspector, who failed in his duty as inspector. Upon the same grounds he is not the fellow-servant of a brakeman who sustains an injury through a defect in a foreign car, provided the defect was one which might have been discovered by the exercise of reasonable care in the proper inspection of the car by the inspector.

At the close of the charge, which included much upon the general subject of the exercise of care in making such an inspection as was possible and usual when foreign cars were received, and to which no exception was taken, the court was asked to charge as follows:

If the defect was latent—that is, one not visible—the defendant is not liable if the injury occurred by reason of such latent or invisible defects.

In response to this request the court instructed the jury as follows:

I would not put it upon the ground of visibility alone. I will give it as I have already done—if it was not discoverable by fair and reasonable and an ordinarily prudent inspection. It does not depend upon the mere question of visibility alone, but it depends upon that. Of course, it is an important circumstance. If it was visible so that everybody could see it, why it would be negligence not to see it. But if it was latent and concealed, in the sense that a reasonable and ordinarily prudent inspection would not discover it, then the railroad company is not liable.

The refusal to instruct in the words of the request is now assigned as error. There was evidence tending to show that neither the broken and rusted condition of one of the screws by which the grab iron was held to the wood of the car nor the decayed condition of the wood surrounding this broken screw was visible from the surface. Indeed, the evidence strongly indicated that no mere visual inspection would have disclosed the dangerous condition of this grab iron. But would a mere visual inspection of such an attachment be due and reasonable

inspection of such an instrumentality? Was no other inspection reasonable and possible under the circumstances under which such cars are received and forwarded? Would a mere visual inspection of a car wheel be regarded as ordinary and reasonable? If the tapping of the wheel with a hammer would disclose by sound the presence or absence of a fracture which might not be disclosed to the eye, could it be said that so ready and accessible a test should not be applied? As much may be said touching the firmness and security with which this grab iron was fastened to the end of this car. This grab iron was one of the rounds in a ladder provided for the use of brakemen, whose duty called them more or less often to the top of such cars. The life of the brakeman may often depend upon the firmness with which such an iron is attached to the end or side of the car. Was there no other ready means of ascertaining whether it was properly and safely attached than a visual inspection? If the application of some force would disclose a dangerous weakness, ought not such a test to be applied? The plaintiff in error did not regard a visual test as alone sufficient, for the inspector says that his habit was to go up such ladders at one end of a car and down the ladder at the other end. Did he do that in this instance? If he did, did he do so in such a way as to throw his weight upon this particular iron, or upon that end of the grab iron supported by the broken screw? If not, would such a test be feasible and calculated to disclose a broken screw or rotten wood? These were proper questions for the jury to consider, and it was not error to modify this request as was done.

Neither was it error to refuse the request for an instruction to find for the defendant. This request was based upon the insistence that there was no evidence upon which the jury could reasonably find that the railroad company had been guilty of negligence. The inspector testified that he did inspect this car upon the day it was received, being the day before the happening of the accident. He says he did so by going up one ladder and down the other. He also testified that neither the condition of the broken screw nor of the wood into which it had been driven could be discovered by the eye. The inspector also testified that he inspected all cars for his company, and that he frequently inspected as many as fifty in one day. It is true that he said he inspected this particular car and this particular grab iron in the manner stated; that is, by going up and down the ladder in which it was one of a series of four or five iron hand holds, one above another. But it is manifest that his testimony was not based upon any memory of this particular car, but depended upon his habit and the record made of cars inspected. Did he in truth and fact test this particular grab iron by any means likely to disclose its weakness? It was held at one end only by a rusted stub of the screw one-half inch

in length, and that embedded in decayed wood, though this fact did not show externally. Is it likely that this iron would not show its weakness if any weight had been thrown upon the broken screw? The grab iron was about 2 feet in length. If the weight of a man was thrown upon the end supported by the sound screw, it might hold. But if that weight was thrown upon the other screw, was it likely to indicate any firmness? The facts were not voiceless. They speak for themselves. The condition of the screw supporting one end, and of the wood into which it was screwed, was such, as disclosed by examination after the accident, as to make it obvious, that any strain thrown upon that end would disclose the weakness with which it was attached. Did the inspection made involve any strain upon the weak end of this grab iron? Did the inspector use this ladder at all? If so, did he use it in such way as to really afford a test of the firmness of its attachment? If the inspection made did not involve such a physical test as was feasible, and calculated to disclose just such an infirmity as existed, would not a jury be warranted in finding either that no physical test at all was made, or that, if made, it was so carelessly made as to be useless? The circumstances were such as that it was not error to take the opinion of the jury.

Let the judgment be affirmed.

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DEFECTIVE SAFETY APPLIANCES.

FLEMING v. SOUTHERN RAILWAY COMPANY.

(131 N. C., 476.)

1. RAILROADS—MASTER AND SERVANT—NEGLIGENCE—AUTOMATIC COUPLERS—PERSONAL INJURIES.

   The failure to equip a locomotive with an automatic coupler in general use is negligence, as much as a failure to so equip a car.

2. RAILROADS—MASTER AND SERVANT—NEGLIGENCE—AUTOMATIC COUPLERS—PERSONAL INJURIES—RULES.

   Where a rule of a railroad company forbids an employee from making couplings of cars otherwise than by a stick, such rule does not literally prohibit the employee from going between an engine and car to couple them if it is practically impossible to make the coupling with a stick.

3. RAILROADS—MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—AUTOMATIC COUPLERS.

   The failure of a railroad company to equip its cars and engines with modern self-coupling devices is a continuing negligence, and there can be no contributory negligence by the employees which will discharge the liability of the master.

4. INSTRUCTIONS—RELEASES—ACTS (PRIVATE) 1897, CHAP. 56—NEW TRIAL.

   Where the language of an instruction is too broad and is calculated, if not intended, to mislead, and may have misled the jury, a new trial will be granted.

(Filed December 9, 1902.)

Action by D. E. Fleming against the Southern Railway Company, heard by Judge A. L. Coble and a jury, at November term, 1901, of the superior court of Iredell County. From a judgment for the plaintiff, the defendant appealed.

Long & *Nicholson*, for the plaintiff. *L. C. Caldwell*, for the defendant.

MONTGOMERY, J.:

The plaintiff, an employee of defendant company, alleged in his complaint that he was ordered by a conductor of one of the defendant's trains to make a coupling of an engine and a freight car, and in obeying the order was hurt through the negligence of the defendant, without fault of his own.

In describing the manner in which he was injured, he further alleged:

That the coupler on the engine was what was usually called a drawbar, and of the weight of about 120 to 125 pounds, and of the length of about 5 or 6 feet; that one end of the drawbar was fastened to the engine, and the other end reached toward

the front of the pilot, and in order to couple with this instrument it was necessary to raise the same about 3 feet and attach the end thereof to the coupler of the car to which it was desired to make the coupling; that it was impossible to make the coupling without the brakeman getting on the pilot in order to lift the brawbar and make the attachment; that on this occasion the plaintiff undertook to make this coupling under the direction of his superior, whose orders he was required to obey, and that this drawbar was one of the old-fashioned methods by which couplings were made.

And as to the particular form of the defendant's negligence the plaintiff further alleged that his injuries were caused by the negligence of the defendant, in that it failed to furnish for said engine and for the cars then and there in use upon its track at the said place safe and suitable machinery, equipments, and devices for the purpose of safely connecting, coupling, and operating the said engine and cars upon its said track, and with modern self-coupling devices, as required by law, and such failure continued up to the time of the injury received by plaintiff as aforesaid; on the contrary, said engine and cars were provided with unsafe, defective, unwieldy, and unsuitable machinery, appliances, and devices, not adapted to, nor answering the purpose of safe use for which they were intended, as the defendant well knew.

The defendant, in its answer, denied that it was negligent in the manner alleged by the plaintiff, and averred that the plaintiff was hurt by the careless and negligent manner in which he made the coupling.

And for a further defense the defendant averred that after the plaintiff was hurt he, for a valuable consideration, paid to him by the defendant, executed and delivered to the defendant a full release and discharge of all claims he had against the defendant on account of the injuries complained of in the complaint; and the defendant pleaded the release in bar and estoppel of the action.

The errors assigned by the defendant were, first, because the court admitted incompetent and improper evidence (pointed out in the case on appeal); second, because the court refused to give certain special instructions asked by the defendant, and in giving certain special instructions asked by the plaintiff, and, third, because the court failed, as defendant contended, to state in a plain and correct manner the evidence given in the cause and to declare and explain the law arising thereon, embracing an explanation of its nature, purpose, and bearing, etc., to prevent misapprehension by inadvertence and mistake.

The first of defendant's prayers for instructions was, in substance, that his honor should tell the jury that if they should find that the car to which the engine was attempted to be coupled by the plaintiff at the time of his injury was equipped with an automatic coupler such as that required by law, and that the engineer was capable and operated his engine with care and caution, then the defendant would not be liable, because not negligent, and the first issue should be answered "No." It was properly refused. There was evidence tending to

show that automatic couplers were in general use and on the engines of the defendant company, and that the engine which the plaintiff undertook to link or couple with the freight car was the only engine of the defendant on that road that was not equipped with a self-coupler at that time. It was also in evidence that engines necessarily have to be coupled with cars, and it seems to us to be essential that the same kind of a device in the way of a coupler should be attached to an engine as is attached to a car, the end and aim of the law being the protection, as far as possible, of the life and limb of persons in railroad employment.

In the defendant's second prayer for instructions it desired the jury to be charged to answer the first issue "No," because this court, in the case of *Greenlee* v. *Ry. Co.* (122 N. C., 977; 41 L. R. A., 399; 65 Am. St. Rep., 734), had declared May, 1898, as "the time" for the equipment of freight cars with automatic couplers. It was stated in the prayer that the plaintiff was hurt in October, 1897. It is not a fact that such time (May, 1898) was fixed as the beginning of the liability of railroad companies for not equipping their cars with automatic couplers.

The plaintiff was injured in December, 1897; Greenlee was hurt in that same year (1897), but before the plaintiff was, and Greenlee's case was heard in this court in 1898.

The third prayer was in these words:

> If the jury should find from the evidence that the rules of the company forbade any employee to make coupling by going between cars, and should find that the plaintiff knew of such rule, and that he signed a paper positively prohibiting an employee from coupling by going between the cars, or any other way except with a stick, and the plaintiff, in violation of the same, exposed himself to danger and went between the car and the engine for the purpose of making the coupling, he would be guilty of contributory negligence, and the jury would answer the second issue "Yes."

His honor properly refused to instruct as requested. The rule, taken literally, does not forbid the plaintiff from going between an *engine* and a car for the purpose of making the coupling. The prohibition is against coupling or uncoupling *cars* with a stick. The links and pins that connect cars are easily manipulated by a stick in the hands of a brakeman, who can stand away and from between the cars and make the coupling.

That is a very different matter from coupling an engine and a car, where the coupler provided for the engine is a bar of iron 5 or 6 feet long and weighing from 100 to 125 pounds, lying across the pilot and to be raised 2 or 3 feet in order to make the coupling. The plaintiff, as a witness in his own behalf, testified that he made the coupling in the usual way, and that in order to get it (the drawbar) in position, "you have to raise it up—one end of it; that you can not raise it up without

getting on the pilot; that you have to get on the pilot to raise it up," and he did it in the usual way that brakemen do it. The conductor testified that it was plaintiff's duty to couple the engine and the car.

James Dumphy, a witness for the defendant, and in the defendant's employment as yard master at Asheville in 1898, said the usual way was to couple engine to car, and the rules of the company required it, and that when the drawbar was down witness always did it with his hands. He said further that it would have been very hard to raise drawbar with a stick; that it would take a very powerful man to raise bar with a stick; it would be more difficult to make the coupling. That rule of the company, as we have seen, did not literally prohibit the plaintiff from going in between an engine and a car to couple them, and neither does it, when given a fair and just construction, require the plaintiff to use a stick for such coupling. And further, from the evidence in reference to the size and length and weight of the drawbar and force necessary to raise it, it must have been the company's intention that such coupling should be made with the hand and not with a stick.

The fourth, fifth, sixth, and seventh prayers for instructions concerned the alleged contributory negligence in making the coupling, and ought not to have been given.

It has been decided by this court that—

"The failure of a railroad company to equip its cars with automatic couplers is a continuing negligence, and where the negligence of the defendant is a continuing negligence, as the failure to furnish safe appliances in general use, when the use of such appliances would have prevented the possibility of the injury, there can be no contributory negligence which will discharge the master's liability." (*Troxler* v. *Ry. Co.*, 124 N. C., 189; 70 Am. St. Rep., 580; 44 L. R. A., 313.)

There can then be no contributory negligence of the plaintiff available to the defendant as a defense in this action, because the plaintiff attempted to make the coupling in discharge of his duty, and because the continuing negligence of the defendant up to the moment of the injury was subsequent to the plaintiff's negligence, if there was any, and is the proximate cause of the injury.

The eighth, ninth, and tenth of defendant's prayers for instruction will be disposed of when we come to consider the eighth and ninth of the plaintiff's prayers for instruction.

The plaintiff's first prayer was in these words:

"First, if you believe the evidence, the drawbar which the defendant had upon its freight engine was not a self-coupling device. The failure of a railroad company to equip its freight cars with modern self-coupling devices is negligence *per se*, continuing up to the time of an injury received by an employee in coupling cars by hand, whether such employee contributed to such injury by his own negligence or not."

There was no error in the giving of the instruction by his honor. The defendant's exception to it no doubt was founded upon the hold-

ing by his honor that it was negligence in the defendant not to equip the engine with an automatic coupler.

The second of the plaintiff's prayers was not given, and the third was in these words:

"If you are satisfied, therefore, by the greater weight of the evidence that the plaintiff went in to make the coupling when the defendant had not furnished the self-coupling device, and received the injury, it is your duty to answer the first issue 'Yes,' and also your duty to answer the second issue 'No.'"

It is plain that the exception to that instruction was based on the same view that the defendant took of the first prayer, that is, that it was not negligence in the defendant to fail to equip its *engine* with a self-coupler, and therefore that the jury should have been allowed to pass upon the question of the contributory negligence of the plaintiff. We are quite sure that his honor did not mean to say, or to intimate, that if the plaintiff's injury grew out of a matter not connected with the coupler, the defendant would be liable simply because the defendant was guilty of negligence in not having equipped its engine with a self-coupler. He had already told the jury in his general charge that the plaintiff must not only show that he was injured as was alleged in the complaint, but that they must find that the injury was due to the fact that the engine was not equipped with an automatic coupler.

Neither can we think that the jury was misled by the language of the instruction. We think the clear meaning of that instruction, when taken with the other part of the charge on that point, is that the plaintiff was in duty bound to go in between the engine and the car to make the coupling, and that because of a failure of the company to furnish a self-coupling device he could not be held as contributing to his own injury if he was hurt while between the engine and car performing his duty. If the plaintiff had been injured while engaged in making the coupling under a state of facts as testified to by himself, he would not have been debarred of the right to maintain his action, even if he had been injured by an act of negligence on the part of the defendant, not connected with the defective coupler, or even by a lawful act of the defendant's agent or employee, because the continuing negligence of the defendant in not properly equipping the engine with a self-coupler must be concurrent with the act which produced the injury, and the one would be as much a proximate cause of the injury as the other. Of course, after the coupling had been made and completed, if the plaintiff had then committed some negligent act, as by standing too near the track, as to be hurt by the moving engine or car, then the negligence of the defendant in not properly equipping the engine would not be the proximate cause of the injury and the plaintiff's negligence would have been a matter for consideration.

The bare fact that a railway company has failed to properly equip

its cars with automatic couplers, and is therefore negligent, does not of itself make the company liable for an injury to an employee. The injury must be connected with and proceed from that particular negligence, and the employee must be in the discharge of his duty.

For the reason that this case has been under an *advisari* for a term, and for other reasons satisfactory to us, we have, notwithstanding our conclusion to order a new trial for an error pointed out, discussed and decided the matters raised in the case on appeal, with the exception of his honor's instruction upon the matters connected with the defense of the release and discharge set up by the defendant in its answer, and the defendant's prayers for instructions 8, 9, and 10, in relation thereto; and what we shall now say concerning those matters will be merely incidental and only in connection with the defendant's exceptions to the eighth and ninth of the plaintiff's special requests for instructions.

His honor, after having charged the jury upon the matter of the release and discharge, and refusing certain special requests of the defendant for instructions, gave the eighth and ninth, asked by the plaintiff, as follows:

"8. A rule of the railroad company, agreed to by the plaintiff, may be waived or abrogated for the company by the conductor making an order contrary to such rule, when it was the duty of the plaintiff to obey such order." "If you find by the greater weight of evidence in this case that the plaintiff signed the paper 'B,' and agreed not to couple cars except with a stick; if you further find that the conductor ordered him to make the coupling, you are instructed that the conductor had the power to waive or abrogate the said contract."

"9. The legislature has enacted that any contract or agreement, express or implied, made by any employee of said company, to waive the benefit of an action which he may have against the company for injuries, shall be null and void. 'And it seems,' says the Supreme Court, 'that the legislature intended to put an end to such intention by saying, in the first section of the act, that he shall have a right of action for injuries caused by such defective machinery, and providing in the second section that he can not waive this right by contract, express or implied.'"

We need not discuss the correctness of the eighth special instruction of the plaintiff which his honor gave, for the reason that what we have said above in discussing the refusal of his honor to give the third prayer requested by the defendant makes it unnecessary. (It may be interesting to observe, however, that there is a marked difference between the language of the agreement made by the plaintiff in this case not to go between the cars for the purpose of coupling them and the language of the agreement on the same subject in the case of *Mason* v. *Railroad*, 114 N. C., 719.)

We think there was substantial error in the giving of the instruction asked by the plaintiff above set forth (No. 9). The language was too broad, and was calculated (not to say intended) to and may have misled the jury and directed their minds to the release and discharge set up by the defendant in its answer.

The language of section 2 of the fellow-servant act (chap. 56, Private Laws, 1897) does not read as it is quoted in the instruction. The language is:

"That any contract or agreement, expressed or implied, made by any employee of said company to waive the benefit of the aforesaid section shall be null and void."

It does not read that any contract, etc., made by an employee of said company to waive the benefit of an action *which he may have* against the company for injuries shall be null and void.

The first section of said act in its application to employees who have been injured by defects in the machinery, ways, or appliances of railroad companies provides that such persons shall be entitled to maintain an action against such company, and section 2 of the same act provides that the injured employee's contract to waive the benefit of the first section shall be null and void. That is, upon entering the service of a railroad company, or afterwards before an injury might happen, the injured employee will not be bound, looking to the future, by any contract he may have made with the company waiving the right to maintain an action for his injury. The words "which he may have against the company for injuries," as they appear in the instruction, have a double aspect; they look both to the future and to the past, and the jury may have applied that language to the release and discharge which the defendant had procured after the injury. And the last section of the instruction (No. 9), a quotation from the opinion of this court in the case of *Coley* v. *Railroad* (128 N. C., 534), we can see might have had a most injurious effect upon the defendant's rights. It could have had no application to the matters embraced in the eighth instruction requested by the plaintiff, which his honor gave. The whole instruction might reasonably have been considered by the jury as a statement made to them by his honor that there could be no release and discharge, even for a valuable consideration, by an employee who had been injured by the defective machinery of a railroad company.

As we have said, we do not discuss in this opinion the matters relating to the release and discharge and the alleged fraudulent character of the paper writing.

For the error pointed out, there must be a

New Trial.

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DEFECTIVE SAFETY APPLIANCES.

CINCINNATI, N. O. & T. P. RY. CO., ET AL. v. GRAY.

(Circuit court of appeals, sixth circuit. May 8, 1900.)

[Reprinted from the Federal Reporter, vol. 101, page 623, by permission of the West Publishing Company.]

1. LIMITATIONS—COMMENCEMENT OF ACTION—AMENDMENTS.

   Amendments to a petition against a railroad receiver to recover damages for the death of an employee do not constitute new suits for the purpose of limitations where the substantive cause of action in both original and amended petitions was the negligence of the receiver.

2. MASTER AND SERVANT—FELLOW-SERVANTS.

   The general yard master and a yard foreman in the switch yards of a railroad company are fellow-servants.

3. SAME—NEW APPLIANCES—FAILURE TO INSTRUCT SERVANT.

   The receiver of a railroad substituted a new and different switch for one formerly used in a switch yard. The new switch was a reasonably safe appliance and properly constructed, but it operated in a different manner from the former one, and, under very probable conditions, was dangerous to those using it and not acquainted with its operation, but no regulations as to its use or other instructions were given the employees in the yard. Within two or three days after the switch was put in a car was derailed in attempting to pass over it, and a yard foreman who was riding thereon was killed under circumstances clearly indicating that if he had known the manner in which the switch was operated the accident would not have occurred. *Held*, That the receiver was liable for having failed in his duty to give proper instructions.

Appeal from the circuit court of the United States for the district of Kentucky.

Samuel Thomas, as complainant, instituted a suit in equity in the court below, having for its chief purpose the foreclosure of a mortgage on the Cincinnati, New Orleans and Texas Pacific Railway. Pending the litigation, the appellant, S. M. Felton, was appointed the receiver of the court in the cause and was charged with the duty of continuing the operations of the railroad. An order was entered requiring all persons having claims against the receiver to file them with the master, Richard P. Ernst, esq., instead of formally suing upon them, and he was directed to report thereon. In pursuance of this requirement the appellee, whose intestate husband was killed while in the service of the receiver, filed a petition before the master, setting up her claim to damages, and no objection was made to this form of proceeding. The petition was several times amended during the progress of the hearings, and again with leave of the court at the trial. The material facts of the case, as we find them from the record, are that the petitioner's intestate, Fletcher B. Gray, was a yard

foreman in the service of the receiver, in the extensive yards of the railway company at Somerset, Ky., on Sunday, March 26, 1893; that two or three days before that date the receiver for the first time had placed in the track of the railroad in the yards at that point what is called an "automatic switch," in substitution for one of a different sort, but had made no rules to govern its use, nor had the receiver given any notice of its dangerous character under certain probable conditions, nor any other instructions upon the subject, and it is not shown that Gray knew anything which was not apparent of the nature of the new appliance further than that one Fred. Cook, the general yard master, had informed the employees that the switch worked automatically; that in fact, however, the switch was not intended by the receiver to be left to work itself automatically, but it was intended that it should always be set by hand; that it was in some sense a switch for emergencies, though our view of the precise character of the switch will be stated further along; that the said Cook was general yard master and in complete control of the yards; that upon the date named he got upon an engine, attached to the front of which were two caboose cars and to the rear another caboose, which was many tons lighter than the engine; that the train thus made up was moved backward, the engine being reversed, thus throwing the single caboose in front of the train as it was moved rapidly south along the main track through the yards; that the engine, in the temporary absence of the regular engineer, was operated by Cook, who, however, was not an experienced engineer; that Gray was on the front caboose of the moving train; that the switch was open; that Gray's attention was called to this fact as the train approached it, but he said it was all right, a remark probably made because he relied upon what Cook, the general yard master, had told the employees, to the effect that the switch worked automatically; that the train, moving at the rate of 18 or 20 miles an hour, went upon the switch; that it was not thrown by the caboose in front, but that the latter mounted the rail and went off the track upon the right side, while the force and weight of the engine following threw the switch as it went through it, thereby keeping the engine and the other caboose cars upon the track until the engine was thrown off to the left by the front caboose in consequence of its derailment; that there was at the time a box car standing on another and parallel track, and the caboose upon which Gray was riding when it was derailed came in collision with the box car, whereby he was mortally wounded and soon afterwards died. It is also claimed that the plates upon which the switch was to move, in being opened and closed, were not oiled, but were impeded by the presence of loose cinders or slag, which prevented the prompt closing of the switch. It is shown that this character of switch had been in use upon other railroads for many years; that the one in use here was well constructed and of good quality, and that it had been carefully selected and was up to the standard of such appliances. It also appears that the railroad track was in good condition at the time. Upon these facts the master reported that the receiver should pay the administratrix of Gray the sum of $8,000 as damages. The circuit court approved this action of the master, judgment was entered accordingly, and, a petition for rehearing having been denied, the case comes here upon appeal from that judgment.

Edward Colston, for appellants.

C. M. Cist, for appellee.

Before LURTON and DAY, *Circuit Judges*, and EVANS, *District Judge*.

EVANS, *District Judge*, after stating the facts as above, delivered the opinion of the court.

Error is assigned by appellant upon the action of the court below in permitting the filing of certain amended petitions, but, as these were matters entirely within the sound discretion of the trial court, the authorities are uniform to the effect that such action is not reviewable

upon appeal. This rule applies quite as forcefully to the amended petition permitted to be filed at or near the final hearing of the case as to the others. Corrections and amendments of pleadings are liberally allowed in order to subserve the ends of justice and to secure a thorough presentation of the claim or defense, so that its merits may be fully disclosed. There was therefore no reviewable error in the action of the circuit court in this respect.

After the judgment in the court below the appellant's counsel presented a petition for a rehearing, which was denied, and error is also assigned upon that action of the court. We need not do more than say that the cases all agree that the action of the trial court, upon petitions of this character and upon motions for new trials, is not assignable for error. They are matters of discretion entirely. It is unnecessary to cite authorities upon this point.

Nor do we think that the Kentucky statute of limitations bars the claim of the petitioner. The claim arose when the injury occurred, on March 26, 1893. The original petition was filed September 18, 1893, much less than the required one year after the injury. The second amended petition was filed on December 26, 1895, a former one not appearing in the record, and the third was, by express leave of the court, filed on April 25, 1899. The last amendment was possibly designed rather to make the pleadings conform to the proof than for any other purpose. It may be, and doubtless is, true that, when an amended petition sets up an entirely new and distinct cause of action, time, under the statute, will not cease to run until the date of filing it. (*Cecil* v. *Savards*, 10 Bush, 96; *Leatherman* v. *Times Co.*, 88 Ky., 292, 11 S. W., 12.) But this rule by no means applies to a case such as we have before us, in which the original and real cause of action, namely, the negligence by which Gray was injured, was never departed from nor abandoned. The plaintiff only restated the circumstances of the injury as the investigation appeared to develop them; but these were the particulars, the details merely, of the substantive claim, stated in general terms, that the injury to Gray was due to the inculpating negligence of the receiver.

The action itself, to recover damages for that negligence and its results, was the principal thing, whatever may have been the details incident thereto, and was commenced within one year, and was not barred by the statute of limitations by reason of the supplying, by amendment, of any omission, or by correcting any error in the original statement of the petitioner's claim that her intestate was injured by the receiver's negligence, whether the details of its happening were one way or another. For the injuries complained of the suit was, without any objection to its form, instituted before the master in the way already mentioned, and, although the means and manner of the infliction of these injuries were variously stated, the appellee, as we

have seen, always relied upon the original claim that her intestate was injured by the negligence of the receiver. It does not appear, therefore, that this assignment of error is well taken. The action was brought within the year allowed by the Kentucky statute. It has been prosecuted continuously from that time until now, and the generic cause of action has always been the same.

It was insisted in the circuit court, as it is here, that Cook was not a fellow-servant of Gray, but a vice-principal, and that his negligence in running the train through the switch when it was open, and his failure to accurately instruct the employees of the receiver as to the limitations upon its use, were not the negligent acts merely of a fellow-servant in the same employment with the decedent, but were those of the master himself, in whose employ as vice-principal it was claimed Cook in these respects stood. We can not accept this view, but agree with the learned circuit judge in his opinion that Cook was the fellow-servant of Gray, and that no liability arose out of what he did at the time of the accident nor previously in reference to the switch. This conclusion seems unavoidable upon the authority of many cases. Among them we need only cite *Railroad Co.* v. *Peterson* (162 U. S., 346; 16 Sup. Ct., 843; 40 L. Ed., 944); *Railroad Co.* v. *Baugh* (149 U. S., 369; 13 Sup. Ct., 914; 37 L. Ed., 772); *Same* v. *Camp* (31 U. S. App., 236; 13 C. C. A., 233; 65 Fed., 952.)

In accepting a voluntary employment, a servant, as is well understood, assumes all the ordinary and obvious risks of such employment, including those arising from the negligence of his fellow-servants; but, in the view we take of the facts of this case, our decision must rest upon another phase of it. As we have seen, the form of switch, which is called automatic, while long, successfully, and safely used by other roads, had been in use in the yards of this railroad when Gray was injured only two or three days, and it is not shown that he personally had any previous knowledge of the workings or operations of such a switch, particularly in so far as they differed from the old one, which it had replaced. No instructions had been given by the receiver explaining the uses of this new appliance; nor had any notice been given of the possible dangers of its use under certain altogether probable circumstances; nor had any regulations whatever been promulgated respecting its operations, although in some important respects they were very different from those of the old one. True, the switch can not be regarded as dangerous per se, but certainly there were conditions upon which it might become most dangerous, and these were unknown to Gray. They existed, but he was not notified of it. Though possibly unfortunately called an "automatic switch," it was not intended to do its own work, but was intended always to be set by hand, though its automatic feature was expected to be a useful safeguard in any time of emergency due to a negligent or accidental omis-

sion to set it by hand. In this sense, and in this sense only, it was an emergency switch. It is not shown that Gray had notice of these facts. On the contrary, the little information he had about the operations of the switch tended rather to show him that it was a labor-saving device, which was designed to avoid the work of setting it by hand, and leave it to be operated upon by the force of moving cars and engines as they came upon it, thus doing its own work.

It is true that the general purpose and operations of an ordinary railroad switch were perfectly understood by Gray, and that if there had been nothing more in this case than the act of a fellow-servant in running a train through a switch, known and seen to be open, there would not be the slightest right to recover for the injury inflicted in that way. But here there was a new kind of switch, very recently put in. The methods of its operation, particularly wherein they differed from those of the former switch, had not been explained to Gray, and were not obvious. The name "automatic" possibly, and even probably, carried an idea which gave weight to the general yard master's statement to the employees that the new switch would work itself, though, in fact, the receiver never intended that it should be operated in that manner. No notice was given that put the employees generally, or Gray especially, in possession of the fact that the switch, while automatic in name, did not operate, and was not intended to operate, of itself, nor otherwise than in such manner as required it always to be set by hand; nor had there been made or published any general regulations upon the subject for the guidance of the servants who were to use the new switch. It is by no means certain that the name or description of the new switch as "automatic" was not so far misleading and dangerous as to give stress to the necessity for notice and instruction.

Upon the facts shown, we think it is not difficult to deduce from the authorities the rules which fix the duties of the master in cases like this, and determine the tests of his responsibilities to his servants. The considerations which demand that the master shall furnish for his employees reasonably safe appliances for doing the work imposed upon them necessarily reach to and include the requirement that when new, and, so far as they differ and as far as the particular work is concerned, unknown and untried, appliances are substituted for old ones, he shall give full and plain instructions to employees as to the parts of such appliances which are new in operation, in order that a servant may have a fair opportunity, before incurring danger, to understand the difference which might, if unknown, produce it. This obligation on the master is equally as strong when appliances are put in which differ only in some respects from old ones for which they are substituted as it is when there is the beginning of a work or when appliances are more radically or even entirely changed. And, indeed, this duty

of the employer is emphasized when ignorance of the points of novelty, either of design or of operation, in the substituted appliance may, as here, involve the most serious consequences affecting the safety and lives of the servants. The obvious fact is that if instruction or notice of the exact situation, in respect to the new switch and its operations, had been given in this case, the accident would not have occurred, at least in the way it did. This illustrates the extreme importance of the duty of the master in regard to making known the difference between the workings of the new and the old machinery, especially where that difference is the one which, if unknown, might bring about dangerous conditions or consequences. The servant in such cases is entitled to notice and information upon these points, and it is the duty of the master to give it. His failure to do so is negligence. In the case before us there was negligence in this respect, and we do not doubt that it was the proximate cause of the injury to Gray.

In speaking of the general rule that the master is exempt from liability to one servant for injuries caused by the negligence of a fellow-servant in the same employment, and of certain exceptions thereto, the Supreme Court, in the case of *Hough* v. *Railroad Co.* (100 U. S., 217; 25 L. Ed., 615), said:

> One, and perhaps the most important, of those exceptions arises from the obligation of the master, whether a natural person or a corporate body, not to expose the servant, when conducting the master's business, to perils or hazards against which he may be guarded by proper diligence upon the part of the master. To that end the master is bound to observe all the care which prudence and the exigencies of the situation require in providing the servant with machinery or other instrumentalities adequately safe for use by the latter. It is implied in the contract between the parties that the servant risks the dangers which ordinarily attend or are incident to the business in which he voluntarily engages for compensation, among which is the carelessness of those, at least, in the same work or employment, with whose habits, conduct, and capacity he has, in the course of his duties, an opportunity to become acquainted, and against whose neglect or incompetency he may himself take such precautions as his inclination or judgment may suggest. But it is equally implied in the same contract that the master shall supply the physical means and agencies for the conduct of his business. It is also implied, and public policy requires, that in selecting such means he shall not be wanting in proper care. His negligence in that regard is not a hazard usually or necessarily attendant upon the business. Nor is it one which the servant, in legal contemplation, is presumed to risk; for the obvious reason that the servant who is to use the instrumentalities provided by the master has, ordinarily, no connection with their purchase in the first instance, or with their preservation or maintenance in suitable condition after they have been supplied by the master.

In the case of *Mather* v. *Rillston* (156 U. S., 399; 15 Sup. Ct., 467; 39 L. Ed., 470), where the circumstances were such as to call for strong and emphatic language, the court said:

> Indeed, we think it may be laid down as a legal principle that in all occupations which are attended with great and unusual danger there must be used all appliances readily attainable, known to science for the prevention of accidents, and that the

neglect to provide such readily attainable appliances will be regarded as proof of culpable negligence. If an occupation attended with danger can be prosecuted by proper precautions without fatal results, such precautions must be taken by the promoters of the pursuit or employers of laborers thereon. Liability for injuries following a disregard of such precautions will otherwise be incurred, and this fact should not be lost sight of. So, too, if persons engaged in dangerous occupations are not informed of the accompanying dangers by the promoters thereof, or by the employers of laborers thereon, and such laborers remain in ignorance of the dangers and suffer in consequence, the employers will also be chargeable for the injuries sustained Both of these positions should be borne constantly in mind by those who engage laborers or agents in dangerous occupations, and by the laborers themselves as reminders of the duty owing to them. These two conditions of liability of parties employing laborers in hazardous occupations are of the highest importance, and should be in all cases strictly enforced. Further than this, it is plain from what has already been stated that the plaintiff knew nothing of the special dangers attending his work, or that he was at all informed by the defendants on the subject. His testimony is positive on this point, and is not contradicted by anyone. With that fact shown, there was no ground for any charge of contributory negligence on his part.

While the facts of that case were quite different from those in the case before us, the general principles announced as to the duty of the master may well find application here to the extent, at least, that such application is called for. It may be that the principles enforced there would create a rule of liability beyond that demanded in this case, and they might establish a test of duty for the master much more exacting than is required in the operations of a railroad where the dangers to experienced employees are much less than those shown under the facts in that case. Still those principles do in their scope embrace cases like the present, where the master so certainly failed in the discharge of his duty in the respect already indicated.

In the case of *Railroad Co.* v. *Herbert* (116 U. S., at page 648; 6 Sup. Ct., 593; 29 L. Ed., 758), in speaking of the correlative duties and rights of master and servant in regard to machinery, appliances, etc., the Supreme Court in one sentence epitomizes a phase of the subject in this language: "His [the servant's] contract implies that in regard to these matters his employer will make adequate provision that no danger shall ensue to him." Doubtless the dangers alluded to were unnecessary or unknown dangers, but this statement from the court's opinion gives a clear idea of the master's duty in the case before us. The master should have taken adequate measures to make known the dangers which persons ignorant of the workings of the new switch might incur by its use.

Many other cases from the Supreme Court might be referred to illustrative of the general principles we are discussing, but we will only name that of *Railway Co.* v. *Archibald* (170 U. S., 669; 18 Sup. Ct., 777; 42 L. Ed., 1188) and that of *Railway Co.* v. *Ross* (112 U. S., 377; 5 Sup. Ct., 184; 28 L. Ed., 787), where, on page 382, 112 U. S., page 186; 5 Sup. Ct., and page 790, 28 L. Ed., the court, after alluding to the argu-

ments by which the doctrine that the servant assumes the known and ordinary risks of his employment are supported, said:

But, however this may be, it is indispensable to the employer's exemption from liability to his servant for the consequences of risks thus incurred that he should himself be free from negligence. He must furnish the servant the means and appliances which the service requires for its efficient and safe performance, unless otherwise stipulated; and if he fail in that respect, and an injury result, he is as liable to the servant as he would be to a stranger. In other words, while claiming such exemption, he must not himself be guilty of contributory negligence.

In 1 Shear. & R. Neg. (5th ed.) § 202, the authors say:

A master who employs servants in a dangerous and complicated business is personally bound to prescribe rules sufficient for its orderly and safe management, and to keep his servants informed of these rules, so far as may be needful for their guidance.

And they amplify the principles applicable to this case in section 203 in the following language:

It is also the personal duty of the master, so far as he can, by the use of ordinary care, to avoid exposing his servants to extraordinary risks which they could not reasonably anticipate, although he is not bound to guarantee them against such risks nor to guard against an accident which is not at all likely to happen. The master must, therefore, give warning to his servants of all perils to which they will be exposed, of which he is or ought to be aware, other than such as they should, in the exercise of ordinary care, have foreseen as necessarily incidental to the business in the matter and ordinary course of affairs, though more than this is not required of him. It makes no difference what is the nature of the peculiar peril, or whether it is or is not beyond the master's control. And it is not enough for the master to use care and pains to give such notice. He must see that it is actually given. If, therefore, he fails to give such warning in terms sufficiently clear to call the attention of his servants to a peril of which he is or ought to be aware, he is liable to them for any injury which they suffer thereby without contributory negligence. Such notice must be timely, that is, given in sufficient time to enable the servant to profit by it. It is therefore the duty of the master to give adequate and timely warnings of changes in the situation involving new dangers.

The last proposition announced in the paragraph just quoted is supported by several cases, such as *Railroad Co.* v. *Kerr* (148 Ill., 605; 35 N. E., 1117), *Donahoe* v. *Railroad Co.* (153 Mass., 356; 26 N. E., 868), *Stephenson* v. *Ravenscroft* (25 Nebr., 678; 41 N. W., 652), *Milling Co.* v. *Sharp* (5 Colo. App., 321; 38 Pac., 850). Elliott, in his work on Railroads (vol. 3, secs. 1268, 1272, 1273), lays down the recognized general propositions in regard to the duty of the master to furnish safe appliances and safe places for the servant to work in, but we do not deem it necessary to cite other authorities.

We conclude that while the railroad track in the yard at Somerset, and even the new switch itself, were in good physical condition, and while it is shown that the receiver used at least ordinary care to have them so, still that the existence of the latent dangers connected with the operation by ignorant persons of the new form of switch just put in, must have been known to the receiver, and that such information must have been acquired by him when he was purchasing the switch

and preparing to put it in use in the yard. At all events, that he must be charged with having such information we can not doubt. If this is true, it follows that it was his duty to give notice of those dangers to Gray by explanation in some form or by rules or regulations brought to his attention. There does not seem to have been anything of this kind done. If notice in any form of the exact facts had come to Gray before he went upon the train, his going would then have been at his own risk, and his not signaling the engineer to stop the train when he saw that the switch was open would then have been his own folly. Not to have endeavored to stop the train under such circumstances, and if he had known of the danger arising from the switch being open, would have been suicidal; but not to have made an effort to have the engineer stop, under the actual facts as disclosed by the evidence, shows the utter ignorance of Gray of the danger about which the master should have seen that he was accurately informed.

The general and correct propositions of law that an employer does not insure the safety of his employee; that if the latter knows of risks, and voluntarily subjects himself to them, the master is not liable for the injury thereby incurred; and that, generally, all that is required of the master is to provide reasonably safe appliances for the use of his employees in their work and reasonably safe places for them to work in—are in no wise questioned. The sole ground upon which we rest our judgment upon this case, is that there was a latent and unapparent, but a very certain and material, danger to uninformed employees, accustomed to operating the other form of switch, in the use, without sufficient knowledge, of the new so-called "automatic switch," under the circumstances of this case, of which danger it was the duty of the receiver, who must have known of it, to give in some way clear and unmistakable information to his employees, including Gray. The failure of the receiver to do this by regulation, rule, notice, or otherwise was such negligence upon his part as renders him liable for the injuries to Gray, who was evidently subjected to a great risk and hazard, the existence of which he did not suspect, but which could have been obviated very easily by notice to him from the better-informed receiver. It results that the judgment of the circuit court must be affirmed.

ON PETITION FOR REHEARING.

(June 11, 1900.)

In an elaborate petition the court has been asked by the appellant to rehear this case, mainly upon the ground that the statute of limitations barred the remedy of the appellee. In support of this contention he relies chiefly upon the opinion of the Supreme Court in the case of *Railway Co.* v. *Wyler* (158 U. S., 285; 15 Sup. Ct., 877; 39 L. Ed.,

983). This question had already received the careful consideration of the court, and there is nothing in the opinion referred to which makes it necessary for us to change our judgment. In that action against the railway company for damages the plaintiff based his claim upon the general law of master and servant and his rights thereunder. During the progress of the suit an amended petition was filed, by which a cause of action was set up growing out of the same facts, but based upon the rights and liabilities created and existing under a statute of the State of Kansas. The statute which supported the claim made in the amended petition had created a cause of action entirely different from the one arising at common law, set up on the original petition. The court, upon that ground alone, held that there was a departure and that the plea of the statute of limitations would therefore prevent the relief sought by the amended petition. To the case before us that ruling can not apply, because, if for no other reason, there was no departure. The principle upon which this case must turn is very different. In *Railroad Co.* v. *Cox* (145 U. S., 593; 12 Sup. Ct., 905; 36 L. Ed., 829) the original petition claimed, as appears from the record, that the injury resulted "because of the defective condition of the crossties and of the roadbed, through the negligence of the receivers." In the amended petition it was averred that "Cox, in coupling the cars, as it was his duty to do, was injured on account of the drawhead and coupling pin not being suitable for the purposes for which they were to be used, he being ignorant thereof and of the defective condition of the track." The statute of limitations being pleaded to the amendment, the court adjudged that it did not apply. The facts in the case before us do not seem to differ in any material respect from those in the case of Cox, just referred to, so far as our decision must depend upon them. Here, as in the Cox case, the original petition specified certain acts of negligence. The amended petition specified certain others which contributed to or concurred in producing the one injury complained of—namely, the death of Gray.

The Kentucky practice is quite as instructive and controlling. In *Greer* v. *Railroad Co.* (94 Ky., 169; 21 S. W., 649) the only negligence alleged in the original petition related to the act of driving or operating the train. An amended petition was tendered, setting up as additional acts of negligence that the guard rail and coupling pin were defective. The inferior court refused to permit the filing of this amendment, which action of the court, under the Kentucky practice, was reviewable. The court of appeals held that it was error to refuse permission to file the amendment, upon the ground that the proposed amendment was not a departure, inasmuch as the cause of action was not changed and as the alleged acts of negligence may all have concurred to cause the injury.

In *Smith* v. *Railway Co.* (5 C. C. A., 557; 56 Fed., 458) it was held by the circuit court of appeals of the eighth circuit that—

> Where, in an action against a railroad company for causing the death of an employee the original petition proceeds entirely on the ground of the company's negligence in employing an engineer of known incompetence, an amendment which alleges that the engineer was negligent, and that he and the deceased were not fellow-servants, does not introduce a new cause of action, but is only an amplification of the original one, and is a proper amendment.

The circuit court of appeals for the fifth circuit, in *Cross* v. *Evans* (29 C. C. A., 523; 86 Fed., 6), distinctly held that the assignment of additional specifications of negligence in an amended petition does not create a new cause of action, so as to let in the plea of limitations. Under section 134 of the Kentucky Civil Code of Practice amendments are most liberally allowed to promote the ends of justice, and we adhere to the view, already expressed, that the amended petitions filed in the case were but amplifications of the one cause of action.

It is not necessary to notice specifically the other grounds upon which the rehearing is asked. The petition is dismissed.

O

DEFECTIVE SAFETY APPLIANCES.

STEVE GREENLEE v. SOUTHERN RAILWAY COMPANY.

(122 N. C., 977-982; 30 S. E., 115; 41 L. R. A., 399.)

1. Contributory negligence of a brakeman in coupling cars will not preclude a recovery for injury caused by the absence of self-couplers, which constituted continuing negligence of the master and existed subsequently to his negligence.
2. Failure to equip freight cars with self-couplers constitutes negligence *per se*.
3. An extension of time procured from the Interstate Commerce Commission by railroad companies for placing self-couplers upon freight cars merely relieves the companies from the penalty provided in the Act to regulate commerce, but does not relieve them from the legal liability to employees for failure to provide suitable appliances in general use.
4. A brakeman's knowledge that cars are not furnished with self-couplers does not make him assume the risk by continuing in the service and coupling the cars in the course of his duty.

(FAIRCLOTH, Ch. J., and FURCHES, J., dissent.)

(May 26, 1898.)

Appeal by defendant from a judgment of the superior court for McDowell County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinions.

Messrs. *Charles Price*, *G. F. Bason*, and *A. B. Andrews, jr.*, for appellant:

When a man contracts to do a thing in a certain way, and not to do it in another way, the rule of the "prudent man" has nothing to do with the case. He must perform the work in the way he contracted to do it; and when he attempts to do it in the way he was warned not to do it, he violates his contract, and he can not recover for any injury he sustains in violating his own contract.

Bailey, Master's Liability for Injuries to Servant, pp. 71 *et seq.*

The plaintiff had two ways of doing his work, the one safe and the other perilous. He adopted the perilous way, and can not recover.

Chambers v. *Western N. C. R. Co.*, 91 N. C., 475; *Pierce, Railroads*, p. 378, notes 2, 3; *3 Elliott, Railroads*, §§ 1280, 1282; *Mason* v. *Richmond & D. R. Co.*, 114 N. C., 718; *Rittenhouse* v. *Wilmington Street R. Co.*, 120 N. C., 547.

The rules of the master, if they are reasonable, are as much a part of the contract between him and the servant as the price per month agreed to be paid.

State v. *Christmas*, 51 N. C. (6 Jones, L.), 471; *Smith* v. *Sasser*, 50 N. C. (5 Jones, L.), 388.

The defendant had a right to have its theory of the case presented to the jury by the specific instructions asked because it was supported by evidence, and the instructions were properly requested.

Poole v. *Consolidated Street R. Co.*, 100 Mich., 379; 25 L. R. A., 744; *Russell* v. *Carolina C. R. Co.*, 118 N. C., 1098; *Stokes* v. *Suffolk & C. R. Co.*, 107 N. C., 178.

ON REHEARING.

There was no allegation in the complaint that the negligence causing the injury was the failure of the company to equip its cars with automatic couplers.

Messrs. *J. T. Perkins* and *E. J. Justice*, for appellee:

If the jury find plaintiff was not negligent, and his superior signaled a car to be kicked down upon him when he could not see it, and if they find that it was the duty and custom of such superior to warn plaintiff of his danger under these circumstances, and he failed, and the injury was a direct result, such failure and conduct on the part of the vice principal would constitute negligence.

Russell v. *Carolina C. R. Co.*, 118 N. C., 1098; *Michael* v. *Roanoke Mach. Works*, 90 Va., 492.

If there was error in submitting the question of whether reasonably safe appliances were furnished, it was a harmless error, and cured by verdict.

Ginsberg v. *Leach*, 111 N. C., 15; *Wagoner* v. *Ball*, 95 N. C., 323; *Deming* v. *Gainey*, 95 N. C., 528; *Bush* v. *Hall*, 95 N. C., 82; *Rogers* v. *Bank of Oxford*, 108 N. C., 578.

The jury was properly left to pass upon the question of plaintiff's and defendant's conduct under the rule of the prudent man.

Hinshaw v. *Raleigh & A. Air Line R. Co.*, 118 N. C., 1047; *Russell* v. *Carolina C. R. Co.*, 118 N. C., 1098.

CLARK, J., delivered the opinion of the court:

In any aspect of this case, the defendant is liable, whether the plaintiff was or was not guilty of contributory negligence; for the negligence of the defendant in not having self-couplers, and in not sending a man to couple cars at all, was a continuing negligence, which existed subsequent to the contributory negligence, if there had been any, of

the plaintiff, and was the proximate cause—the *causa causans*—of the injury. Six years ago, in *Mason* v. *Richmond & D. R. Co.* (111 N. C., 482; 18 L. R. A., 845, 846), the court, in considering "whether the defendant company was negligent in failing to provide what is known as the Janney or some other improved coupler, which would obviate the necessity, under any circumstances, of going between the ends of cars in order to fasten one to another," said: "We think that the time has arrived when railroad companies should be required to attach such couplers * * * on all passenger cars, * * * and the new couplers have now become so cheap, as compared to the value of the lives and limbs of servants and passengers, that it is not unreasonable to require that they provide them on peril of answering for any damage which might have been obviated by their use." While the court declined, on account of the expense, to hold that the same was true at that time as to freight cars, it added: "Doubtless, the day will soon come" when it would be negligence not to attach them to freight as well as passenger cars. Congress so thought, and passed an act (27 Stat. at L., 531) requiring self-couplers and air brakes to be placed on all cars, freight as well as passenger, by January 1, 1898; and this had been complied with as to "over 60 per cent of the freight cars," besides nearly all passenger cars, operating in interstate commerce, by that date. In *Wissell* v. *West Asheville & S. S. R. Co.* (120 N. C., 557), the above citation from *Mason* v. *Richmond & D. R. Co.* was approved, and the court held that, while it was not negligent to fail to provide the latest improved appliances, a railroad company was liable for any injury caused by the failure to use approved appliances that are in general use. The railroad companies have of late procured from the Interstate Commerce Commission an extension till January 1, 1900, of the time by which self-couplers should be placed upon all freight cars used in interstate service, but this was for their accommodation, and did not and could not relieve them from the legal liability incurred for injuries caused by their failure to provide "suitable appliances in general use" where the use of such would have prevented the injury. It only relieved them from the penalty provided in that act. The Eleventh Annual Report (1897) of the Interstate Commerce Commission, issued by authority of the United States Government, and based upon the reports of the railroad companies themselves, shows (p. 80) that of railroad employees (leaving out passengers altogether), 1,861 were killed and 29,969 were wounded in the year ending June 30, 1896, being greater loss than in many a battle of historic importance. Of the trainmen, this report (p. 130) shows that nearly 1 in 9 had been killed or wounded that year—total of over 17,000. Of these casualties, it is officially stated, 229 were killed and 8,457 were wounded in this single particular of coupling and uncoupling cars. As those figures are reported by the corporations themselves it is not probable that they are overstated.

If the railroads not reporting to the Interstate Commerce Commission (because not engaged in interstate carrying) should be added, the figures of killed and wounded from this cause would doubtless be largely increased. By these figures, for the last year reported, nearly 9,000 men had been killed and wounded in coupling and uncoupling cars. As the corporations, on their own motion, or under compulsion of Congressional action and judicial decision, have adopted self-couplers on the passenger cars, and on "over 60 per cent" of the freight cars, it will be seen how many thousands of lives and bodies have been saved thereby; but that still nearly 9,000 men should in one year be killed or wounded "coupling and uncoupling" the freight cars which up to June 30, 1896, still required that duty, for lack of self-couplers, is the highest proof of the duty of the courts to enforce liability for failure to provide self-couplers in every case where an injury occurs from that cause. That nearly 9,000 men should still be killed and wounded in one year for failure to furnish appliances which are so widely in use, and which would entirely prevent such accidents, points out the duty of the courts.

In *Witsell's Case* (120 N. C.), at page 562, this court says: "If an appliance is such that the railroads should have it, the poverty of the company is no sufficient excuse for not having it." But in fact this defendant reports that this railroad has issued bonds and stocks for $76,557 per mile. (N. C. R. R. Com. Report, 1896, at page 246.) This is presumed to have been paid in by its issuing the bonds and stocks, and hence it should be able to furnish appliances which will protect its employees from such injuries as this, and should be held liable for failure to do so, for the Interstate Commerce Commission shows the self-couplers can be added for $18 per car. In a large majority of the States, as well as by the Federal Government, railroad commissions have been created to supervise and regulate the charges and the conduct of these corporations. The courts will be very derelict in their duty if they do not enforce justice in favor of employees as well as the public. Six years ago this court said it would soon be negligence *per se* whenever an accident happened for lack of a self-coupler. Congress has enacted that self-couplers should be used. For their lack this plaintiff was injured. It is true the defendant replies that the plaintiff remained in its service knowing it did not have self-couplers. If that were a defense no railroad company would ever be liable for failure to put in life-saving devices, and the need of bread would force employees to continue the annual sacrifice of thousands of men. But this is not the doctrine of "assumption of risk." That is a more reasonable doctrine and is merely that when a particular machine is defective or injured, and the employee knowing it continues to use it, he assumes the risk. That doctrine has no application where the law requires the adoption of new devices to save life or limb

(as self-couplers), and the employees, either ignorant of that fact or expecting daily compliance with the law, continues in service with the appliances formerly in use. The defendant, after notice of six years from this court, and with notice of the act of Congress, and also from the general adoption of self-couplers, that it should use them, was guilty of negligence in failing to do so. The injury to the plaintiff could not have occurred save for the failure of the defendant to comply with its duty in this regard, and the court below should have held it liable to the plaintiff upon the defendant's own evidence.

Affirmed.

O

DEFECTIVE SAFETY APPLIANCES.

C. D. HARDEN v. NORTH CAROLINA RAILROAD COMPANY.

(129 N. C., 354, and 55 L. R. A., 784; 40 S. E., 184.)

1. A company operating an interstate railroad is liable to its employees for injuries caused by attempting to couple cars equipped with old-style drawheads and links.
2. Authority to a railroad company to "farm out" its right of transportation does not confer power to execute a lease exempting it from liability for injuries to the lessee's employees through the lessee's negligence—at least if the lease is executed after the words have been construed by the court not to exempt it, and the lessor has required a deposit to indemnify it in case its liability is enforced.
3. The rule forbidding a railroad company to exempt itself without statutory authority from liability for injuries caused by the negligence of its lessee applies in favor of the lessee's employees.

(December 17, 1901.)

Appeal by defendant from a judgment of the superior court for Rowan County in favor of plaintiff in an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. *Affirmed.*

The facts are stated in the opinions.

Mr. Charles Price, *Messrs. F. H. Busbee* and *A. B. Andrews, jr.*, for appellant.

Messrs. Overman & Gregory for appellee.

CLARK, J., delivered the opinion of the court:

The plaintiff was a brakeman in the service of the Southern Railway Company (lessee of defendant) on a freight train, and was injured in making a coupling between a box car and the shanty car "with a link and the old-style drawhead." The shanty car was not equipped with automatic couplers, nor was the train fully equipped with Janney couplers, or other modern self-coupling devices; and the court charged the jury, citing *Greenlee* v. *Southern R. Co.*, 122 N. C., 977; 41 L. R. A., 399; 30 S. E., 115 (since followed in *Troxler* v. *Southern R. Co.*, 124 N. C., 189; 44 L. R. A., 313; 32 S. E., 550, and other cases), as follows: "If you find that the freight train was not fully provided with modern self-acting couplers, and that the plaintiff would not have

been injured had the cars been so provided, you will find the first issue 'Yes' and the second issue 'No.'" The judge followed the decisions of this court, and, without repeating the arguments therein, it is sufficient to say that we reaffirm our former rulings, holding a railroad company responsible for injuries to its employees which would not have occurred if there had been provided by it those humane devices, protecting the lives and limbs of its employees, which are in general use. The reports of the United States Interstate Commerce Commission, issued by the authority of the Federal Government, show the reduction of many thousands annually in the number of employees killed or maimed in coupling cars since the introduction of automatic couplers (which now is compulsory under the act of Congress as to all interstate roads). This should be a sufficient answer to all complaints as to our former ruling. If the lives and limbs of employees can be saved by such provision of improved appliances, public policy and humanity require the courts to exact liability for failure to furnish them.

The principal point made, however, is in the effort to induce this court to overrule a still longer line of decisions which holds this lessor, the North Carolina Railroad Company, liable for the acts and defaults of its lessee, the Southern Railroad Company. The charter of the North Carolina Railroad Company (Laws 1848–49, chap. 82, § 19) authorizes the company "to farm out its right of transportation over said railroad, subject to the rules above mentioned." There are no other words from which a right to lease the road can be inferred. As at the date of the charter railroads were comparatively new, and the popular idea was that a railroad company was to maintain the roadbed and "farm out" rights of transportation over it, as was the case with canal companies and is to-day the case with express companies and many "fast freight" and "through lines," it was thought by many that these words did not authorize, and were not intended to authorize, a lease of its entire property, which lease had the effect to take it out of a "State system" running from the mountains to the seacoast under State control and make it a part of an interstate line running north and south under the control of foreign corporations, to the utter destruction of the "State system" intended by the charter of the defendant.

The authority to lease, based upon the permission "to farm out its right of transportation," came before this court in *State* v. *Richmond and D. R. Co.* (72 N. C., 634), and that expanded construction was sustained by a divided court, Judge Settle writing the opinion, Judge Bynum dissenting in a remarkably able opinion. Judge Rodman did not sit. If it were a new question this court might possibly hold with Judge Bynum as to the reasonable construction of the meaning of the words "to farm out the right of transportation," but the lessee would

rely upon the fact that it took its lease relying upon the construction placed by this court upon the meaning of those words. But it also made its lease subsequent to the decision of this court—often since repeated—that those words did not allow the lessor to rid itself by any lease made under authority conferred by those words of liability for any acts of negligence or torts committed by the lessee as to the world, its passengers, or its employees, the latter being held in effect to be simply subemployees of the lessor, employed by its agent for the operation of the road, its lessee.

In *Aycock* v. *Raleigh and A. Air Line R. Co.* (1883), 89 N. C., 321, it had been held (Smith, Ch. J.) the authorities "fully sustain the proposition that the defendant company leasing the use of its road or permitting the use of it by another company remains liable for the consequences of the mismanagement of the train in charge of the servants of the latter, and the injury thence resulting, to the same extent as if such mismanagement was the act or neglect of its own servants operating its own train;" citing the authorities. In *Logan* v. *North Carolina R. Co.* (116 N. C., 940; 21 S. E., 959) this very charter of the defendant company was elaborately considered, and in an able opinion by Mr. Justice Avery, concurred in by the entire court, it was held that no lease made by virtue of the above-cited words (there being no clause of exemption granted to the lessor) would exempt the defendant from liability for the wrongful acts, defaults, or negligence of its lessee; and hence that the lessor company was liable for injuries sustained from the negligence of its lessee by a section hand employed by such lessee.

This decision was rendered by this court at February term, 1895, and the lessor and lessee, both aware of the construction placed by the court upon a contract by lessor to "farm out its right of transportation," on August 16 following executed the lease under which the lessee is now operating the defendant's road. Both parties had that decision in view, and provided for the liability of the defendant for all the acts and defaults of its lessee, by a stipulation in said lease (which lease is filed as a part of the record in this case) for a deposit of "not less than $175,000 in cash, or its equivalent, to be applied" to the performance of the stipulations in the contract to be performed by the lessee, and among them "to any judgments recovered in any court of the State or of the United States when finally adjudicated for any tort, wrong, injury, negligence, default, or contract done, made, or permitted by the parties of the second part, its successors, assigns, employees, agents, or servants, for which the party of the first part shall be adjudged liable, whether the party of the first part is sued jointly with or separately from the party of the second part;" and further provides to what agents of the lessee notices of such suits shall be given by the lessor when sued singly, and for the renewal and mainte-

nance of said sum whenever diminished by such application of any part thereof. The lease was made subsequent to the decision of the *Logan case*. Both lessor and lessee knew of the continuing liability of lessor under any lease authorized by the words "farm out" as construed by this court, and stipulated in view of such liability, a deposit being put up, to be maintained at a fixed sum, to guarantee the lessor, the defendant herein.

If the lease is valid because made subsequent to the decision of a divided court in *State* v. *Richmond and D. R. Co.* (72 N. C., 634), it does not lie in the mouth of the lessor to contend that it does not remain liable for all acts of its lessee in the operation of its road under a lease made subsequent to the decision of a unanimous court in *Logan* v. *North Carolina R. Co.* (116 N. C., 940; 21 S. E., 959), especially when it has stipulated against loss therefrom by exacting a deposit from its lessee. And, in fact, the lessor has not complained. This objection has several times been raised in this court, but always by counsel of the lessee, and ruled upon again and again, always in conformity to the precedents in *Aycock's case* (89 N. C., 321), and *Logan's case* (116 N. C., 940; 21 S. E., 959). The defendant has never averred any loss, detriment, or probable damage by reason of its being held liable for the acts of its lessee as its agent in the operation of the road. The lessee, the Southern Railway Company, is the only railroad company operating in this State which claims to be a foreign corporation, as we know from the statute incorporating all others, except possibly one other lessee. It has been stated by its counsel in their place here that the Southern Railway Company has "domesticated," but it is unnecessary to discuss here the point which has been decided in *Debnam* v. *Southern Bell Teleph. and Teleg. Co.* (126 N. C., 831; 36 S. E., 269).

Whether the lessee be a foreign corporation or not the lessor, when it entered into this lease, knew that by the terms of its charter, as construed by this court, it would remain liable, notwithstanding such lease, for the acts of its lessee. *Logan* v. *North Carolina R. Co.* (116 N. C., 940; 21 S. E., 959) has been cited and approved on this point. *Tillett* v. *Norfolk and W. R. Co.* (118 N. C., 1043; 24 S. E., 111); *James* v. *Western N. C. R. Co.* (121 N. C., 528; 46 L. R. A., 306; 28 S. E., 537); *Norton* v. *North Carolina R. Co.* (122 N. C., 937; 29 S. E., 886); *Benton* v. *North Carolina R. Co.* (122 N. C., at page 1009; 30 S. E., 333); *Pierce* v. *North Carolina R. Co.* (124 N. C., 93; 44 L. R. A., 316; 32 S. E., 399); *Perry* v. *Western N. C. R. Co.* (128 N. C., 473; 39 S. E. 27), and *Raleigh* v. *North Carolina R. Co.* (129 N. C., 265; 40 S. E., 2), in most of which cases this defendant was a party. Had *Logan's case* not been decided prior to the lease made by the lessor and stipulations in view thereof made in the lease, and viewed as an original question, it is sustained by the overwhelming weight of authority and

upon reason. In 20 Am. and Eng. R. Cas., N. S., Annotated, at page 847, the rule is laid down: "A railroad company which has leased its road, cars, and engines, and allows the lessee company to operate the same, is liable to third persons or the public for carelessness and negligence of the lessee and for defects in the construction or maintenance of the road and its equipments, unless there is a statutory provision to the contrary" (and there is none in this case). For this proposition it there cites 36 cases from the United States courts and the courts of different States and from England, and it is not necessary to repeat them here.

In *Washington, A. and G. R. Co.* v. *Brown* (17 Wall., 450; 21 L. ed., 677) the court says: "It is the accepted doctrine in this country that a railroad corporation can not escape the performance of any duty or obligation imposed by its charter or the general laws of the State by a voluntary surrender of its road into the hands of lessees. The operation of the road by the lessees does not change the relations of the original company to the public"—and cites with approval 1 Redf. Railways, to same effect. Also to same purport are 1 Beach, Priv. Corp., § 366; 1 Spelling, Priv. Corp., 135, and several other authorities cited in *Logan* v. *North Carolina R. Co.* (116 N. C., 946 et seq.; 21 S. E., 959). In *Harman* v. *Columbia and G. R. Co.* (28 S. C., 401; 5 S. E., 835) the words of the charter construed were almost identical with those in defendant's charter, and it was held that a lease made thereunder did not relieve the lessor from liability for the acts of its lessee. In *National Bank* v. *Atlanta and C. Air Line R. Co.* (25 S. C., 216) the same ruling is made as to nondelivery of freight, the court saying: "We are unable to appreciate the distinction attempted to be drawn by appellant's counsel between the liability of a railroad company which has leased its line to another to actions *ex delicto* and actions *ex contractu*. The foundation of such liability is that such a company has by accepting its charter assumed obligations to the community from which it can not absolve itself by leasing its road to another company; and as such a carrier is not only under an obligation to carry passengers safely, but also to deliver goods intrusted to it for transportation, we think the same principle which would make the lessor liable in the one case would also make it liable in the other."

In *Balsley* v. *St. Louis, A. and T. H. R. Co.* (119 Ill., 68; 59 Am. Rep., 784; 8 N. E., 859) it is said that the liability of the lessor for the acts of the lessee is not merely because the lessee is the agent of the lessor, but, further, because the lessor, in consideration of the grant of its charter, undertook the performance of duties and obligations, and it is against public policy for it to be relieved therefrom without the express consent of the legislature. In 20 Am. and Eng. R. Cas. N. S. at page 848 it is said: "A railroad company which leases its road pursuant to a statutory authority which does not contain any provision

releasing it from the performance of its duties to the public, is liable for personal injuries sustained through negligence in the operation of the road by the lessee." To the same purport are: United States: *Thomas* v. *West Jersey R. Co.* (101 U. S., 83; 25 L. ed., 952); *Washington, A. and G. R. Co.* v. *Brown* (17 Wall., 445; 21 L. ed., 675); *Illinois C. R. Co.* v. *Barron* (5 Wall., 90; 18 L. ed., 591); *York and M. L. R. Co.* v. *Winans* (17 How., 39; 15 L. ed., 29). Georgia: *Singleton* v. *Southwestern R. Co.* (70 Ga., 464; 48 Am. Rep., 574); *Macon and A. R. Co.* v. *Mayes* (49 Ga., 355; 15 Am. Rep., 678). Illinois: *Ohio and M. R. Co.* v. *Dunbar* (20 Ill., 623; 71 Am. Dec., 291); *Peoria and R. I. R. Co.* v. *Lane* (83 Ill., 448); *Pittsburg, C. and St. L. R. Co.* v. *Campbell* (86 Ill., 443); * * * (and other cases cited).

In *Ohio and M. R. Co.* v. *Dunbar* (Ill.), 71 Am. Dec., 295, it is said by Judge Freeman in his notes, "It is a well-settled doctrine that, in the absence of legislative authority permitting a lease and exempting the company from liability, it is responsible for the torts of its lessee," citing many cases. In *Nelson* v. *Vermont and C. R. Co.* (26 Vt., 717, 62 Am. Dec., 614), Chief Justice Redfield says: "As to the liability of the defendants for the acts of their lessees, who were running the defendants' road under a long lease, we think there can be no doubt. Unless we can hold the defendants thus liable, they might put their road into the hands of corporations or individuals of no responsibility." If a railroad corporation could relieve itself of liability by leasing, it would follow that leases could be made to another corporation with no tangible assets—as, indeed, the lessee in this case, if a foreign corporation has none in this State—leaving the travelers and shippers over its line, the general public, and its employees alike, without recourse on the property of the corporation which was chartered to operate the road and which is left in receipt of the rent, which might readily be made high enough to cover the profits. Thus the company would, by a device of a lease, receive the profits without incurring the liabilities of its business.

In many cases it has been held that a bona fide mortgage can not have that effect (*Acker* v. *Alexandria and F. R. Co.*, 84 Va., 648, 5 S. E., 688; *Naglee* v. *Alexandria and F. R. Co.*, 83 Va., 707, 3 S. E., 369; *Wilmington and W. R. Co.* v. *Burnett*, 123 N. C., 210, 31 S. E., 602); and the rights of mortgagees for money presumably applied to debts are stronger than those of lessors. The question here is not the liability of lessees, which also exists, but of the right of the lessor to put off the liabilities incident to the franchise given it, while continuing to enjoy its profits through the medium of a lease. This the corporation owning the property can not do.

No error.

SAFETY APPLIANCE ACT.

AUTOMATIC COUPLERS.

DECISION OF UNITED STATES CIRCUIT COURT OF APPEALS.

JOHNSON v. SOUTHERN PACIFIC CO.

(Circuit court of appeals, eighth circuit. August 28, 1902. No. 1722.)

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1. AUTOMATIC COUPLERS—ACT OF MARCH 2, 1893, DOES NOT REQUIRE LOCOMOTIVES TO BE EQUIPPED WITH.

   The act of March 2, 1893 (27 Stat., c. 196, p. 531), does not make it unlawful for common carriers to use locomotives engaged in interstate commerce which are not equipped with automatic couplers.

2. CONSTRUCTION OF STATUTES—ACT CHANGING COMMON LAW STRICTLY CONSTRUED.

   A statute changing the common law modifies or abrogates it no further than the clear import of its language necessarily requires.

3. SAME—PENAL STATUTE STRICTLY CONSTRUED.

   A penal statute may not be so broadened by construction as to make it cover, and authorize the punishment of, otherwise lawful acts, which are not denounced by the usual meaning of its express terms.

4. SAME—ENUMERATION OF SUBJECTS EXCLUDES OTHERS.

   A statute which enumerates the parties, things, or acts which it denounces thereby impliedly excludes all others from its effect.

5. SAME—WHEN NOT PERMISSIBLE.

   When the language of a statute is unambiguous, and its meaning is plain, it must be held to mean, and the legislative body must be held to have intended, what it plainly expresses, and no room is left for construction.

6. INJURY TO SERVANT—NEGLIGENCE—ASSUMPTION OF RISK.

   A servant assumes the ordinary risks and dangers of the employment upon which he enters, so far as they are known to him and so far as they would have been known to one of his experience, age, and capacity by the use of ordinary care.

7. SAME—ASSUMPTION OF RISK OF COUPLING CARS WITH DIFFERENT COUPLERS.

   A brakeman of ordinary intelligence and experience assumes the risks and dangers of coupling cars provided with different kinds of well-known couplers, bumpers, and deadwoods, because these are the ordinary risks and dangers of his service.

¶6. See Master and Servant, vol. 34, Cent. Dig., sec. 554.

8. SAME—AUTOMATIC COUPLERS—ACT OF MARCH 2, 1893—EQUIPMENT OF CAR WITH ONE KIND OF COUPLER SUFFICIENT.

The equipment, under the act of March 2, 1893, of a car with automatic couplers which will couple automatically with those of the same kind of make, is a compliance with the statute. It does not require cars used in interstate commerce to be equipped with couplers which will couple automatically with cars equipped with automatic couplers of other makes.

9. SAME—WHEN CAR IS USED IN MOVING INTERSTATE TRAFFIC.

Cars loaded with articles shipped to other States, and started, whether in yards, on side tracks, or in trains, are used in moving interstate traffic. But vacant cars in yards, on side tracks, in repair shops, or in trains which are not loaded with, or in use to move articles of, interstate commerce, do not fall within the terms or meaning of the act of March 2, 1893. A dining car standing empty on a side track at an intermediate station, where it had been left by a train engaged in interstate traffic until it should be taken by another train engaged in the same traffic, going in the opposite direction, and which the owner intended to use in interstate traffic, was drawn by a freight engine from the side track to the turntable, turned, and placed again upon the side track. *Held*, that the car was not used in moving interstate traffic while it was on the side track and while it was being turned.

THAYER, J., dissenting in part.

(Syllabus by the court.)

In error to the circuit court of the United States for the district of Utah.

This is an action for damages for a personal injury, in which the court instructed the jury to return a verdict for the defendant upon this state of facts: The defendant was operating passenger trains between San Francisco, in the State of California, and Ogden, in the State of Utah. It was in the habit of drawing a dining car in these trains. Such a car formed a part of a train leaving San Francisco, and ran through to Ogden, where it was ordinarily turned and put into a train going west to San Francisco. On August 5, 1900, the east-bound train was so late that it was not practicable to get the dining car into Ogden in time to place it in the next west-bound train, and it was therefore left on a side track at Promontory, in the State of Utah, to be picked up by the west-bound train when it arrived. While it was standing on this track the conductor of a freight train which arrived there was directed to take this dining car to a turntable, turn it, and place it back upon the side track, so that it would be ready to return to San Francisco. The conductor instructed his crew to carry out this direction. The plaintiff, Johnson, was the head brakeman, and he undertook to couple the engine to the dining car for the purpose of carrying out the order of the conductor. The freight engine was equipped with a Janney coupler, which would couple automatically with another Janney coupler, and the dining car was provided with a Miller hook or Miller coupler, which would couple automatically with another Miller hook; but the Miller hook would not couple automatically with the Janney coupler, because it was on the same side, and would pass over it. Johnson knew this, and undertook to make the coupling by means of a link and pin. He knew that it was a difficult coupling to make, and that it was necessary to go between the engine and the car to accomplish it, and that it was dangerous to do so. Nevertheless he went in between the engine and the car, and tried to make the coupling three times, without objection or protest. He failed twice, and the third time his hand was caught and crushed so that it became necessary to amputate his arm above the wrist.

W. L. Maginnis, for plaintiff in error.

Henry G. Herbel (*Martin L. Clardy*, on the brief), for defendant in error.

Before SANBORN and THAYER, *Circuit Judges*, and LOCHREN, *District Judge*.

SANBORN, *Circuit Judge*, after stating the case as above, delivered the opinion of the court:

Under the common law the plaintiff assumed the risks and dangers of the coupling which he endeavored to make, and for that reason he is estopped from recovering the damages which resulted from his undertaking. He was an intelligent and experienced brakeman, familiar with the couplers he sought to join, and with their condition, and well aware of the difficulty and danger of his undertaking, so that he falls far within the familiar rules that the servant assumes the ordinary risks and dangers of the employment upon which he enters, so far as they are known to him, and so far as they would have been known to one of his age, experience, and capacity, by the use of ordinary care, and that the risks and dangers of coupling cars provided with different kinds of well-known couplers, bumpers, brakeheads, and deadwoods are the ordinary risks and dangers of a brakeman's service. (*Manufacturing Co.* v. *Erickson*, 55 Fed., 943, 946, 5 C. C. A., 341, 343; *Railroad Co.* v. *Blake*, 27 U. S. App., 190, 194, 11 C. C. A., 93, 95, 63 Fed., 45, 47; *King* v. *Morgan*, 48 C. C. A., 507, 511, 109 Fed., 446, 450; *Gold Mines* v. *Hopkins*, 111 Fed., 298, 304, 49 C. C. A., 347, 353; *Railroad Co.* v. *McDade*, 135 U. S., 554, 570, 10 Sup. Ct., 1044, 34 L. Ed., 235; *Railroad Co.* v. *Seley*, 152 U. S., 145, 152, 14 Sup. Ct., 530, 38 L. Ed., 391; *Kohn* v. *McNulta*, 147 U. S., 238, 241, 13 Sup. Ct., 298, 37 L. Ed., 150; *Railroad Co.* v. *Voight*, 176 U. S., 498, 120 Sup. Ct., 385, 44 L. Ed., 560; *Sweeney* v. *Envelope Co.*, 101 N. Y., 520, 5 N. E., 358, 54 Am. St. Rep., 722; *Railway Co.* v. *Smithson*, 45 Mich., 212, 7 N. W., 791; *Hodges* v. *Kimball*, 44 C. C. A., 193, 104 Fed., 745; *Whitcomb* v. *Oil Co.* (Ind. Sup.), 55 N. E., 440, 442; *Boland* v. *Railroad Co.*, Ala., 18 South., 99.)

This proposition is not seriously challenged, but counsel base their claim for a reversal of the judgment below upon the position that the plaintiff was relieved of this assumption of risk and of its consequences by the provisions of the act of Congress of March 2, 1893 (27 Stat., c. 196, p. 531). The title of that act and the parts of it that are material to the consideration of this contention are these:

AN ACT to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving wheel brakes, and for other purposes.

SECTION 1. That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power-driving wheel brake and appliances for operating the train brake system. * * *

SEC. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with

couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars. * * *

SEC. 6. That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act shall be liable to a penalty of one hundred dollars for each and every such violation. * * *

SEC. 8. That any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provisions of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge.

The first thought that suggests itself to the mind upon a perusal of this law, and a comparison of it with the facts of this case, is that this statute has no application here, because both the dining car and the engine were equipped as this act directs. The car was equipped with Miller couplers which would couple automatically with couplers of the same construction upon cars in the train in which it was used to carry on interstate commerce, and the engine was equipped with a power driving wheel brake such as this statute prescribes. To overcome this difficulty, counsel for the plaintiff persuasively argues that this is a remedial statute; that laws for the prevention of fraud, the suppression of a public wrong, and the bestowal of a public good are remedial in their nature and should be liberally construed to prevent the mischief and to advance the remedy, notwithstanding the fact that they may impose a penalty for their violation; and that this statute should be so construed as to forbid the use of a locomotive as well as a car which is not equipped with an automatic coupler. In support of this contention he cites *Suth. St. Const.*, sec. 360; *Wall* v. *Platt*, 169 Mass., 398, 48 N. E., 270; *Taylor* v. *U. S.*, 3 How., 197, 11 L. Ed., 559 and other cases of like character. The general propositions which counsel quote may be found in the opinions in these cases, and in some of them they were applied to the particular facts which those actions presented. But the interpolation in this act of Congress, by construction, of an ex post facto provision that it is, and ever since January 1, 1898, has been, unlawful for any common carrier to use any engine in interstate traffic that is or was not equipped with couplers coupling automatically, and that any carrier that has used or shall use an engine not so equipped has been and shall be liable to a penalty of $100 for every violation of this provision, is too abhorrent to the sense of justice and fairness, too rank and radical a piece of judicial legislation, and in violation of too many established and salutary rules of construction, to commend itself to the judicial reason or conscience. The primary rule for the interpretation of a statute or a contract is to ascertain, if possible, and enforce the intention which the legislative body that enacted the law, or the parties who made the agreement, have expressed therein. But it is the intention expressed in the law or contract, and that only, that the courts may give effect to. They can

not lawfully assume or presume secret purposes that are not indicated or expressed by the statute itself and then enact provisions to accomplish these supposed intentions. While ambiguous terms and doubtful expressions may be interpreted to carry out the intention of a legislative body which a statute fairly evidences, a secret intention can not be interpreted into a statute which is plain and unambiguous, and which does not express it. The legal presumption is that the legislative body expressed its intention, that it intended what it expressed, and that it intended nothing more. (*U. S.* v. *Wiltberger*, 5 Wheat., 76, 5 L. Ed., 37; *Insurance Co.* v. *Champlin*, C. C. A., 116 Fed., 858; *Cold Blast Trans. Co.* v. *Kansas City Bolt and Nut Co.*, C. C. A., 114 Fed., 77, 81; *Railway Co.* v. *Bagley*, 60 Kan., 424, 431, 56 Pac., 759; *Woodsay* v. *Ryan*, 59 Kan., 601, 54 Pac., 664; *Davis* v. *Mining Co.*, 93 Mich., 491, 53 N. W., 625, 24 L. R. A., 357; *Vogel* v. *Pekee*, 157 Ill., 339, 42 N. E., 386, 30 L. R. A., 491; *Campbell* v. *Lambert*, 36 La. Ann., 35, 51 Am. Rep., 1; *Turnpike Co.* v. *Coy*, 13 Ohio St., 84; *Stensgaard* v. *Smith*, 43 Minn., 11, 44 N. W., 669, 19 Am. St. Rep., 205.) Construction and interpretation have no place or office where the terms of a statute are clear and certain, and its meaning is plain. In such a case they serve only to create doubt and to confuse the judgment. When the language of a statute is unambiguous, and its meaning evident, it must be held to mean what it plainly expresses, and no room is left for construction. (*Swarts* v. *Siegel*, C. C. A., 117 Fed., 13; *Knox Co.* v. *Morton*, 15 C. C. A., 671, 673, 68 Fed., 787, 789; *Railway Co.* v. *Sage*, 17 C. C. A., 558, 565, 71 Fed., 40, 47; *U. S.* v. *Fisher*, 2 Cranch, 358, 399, 2 L. Ed., 304; *Railway Co.* v. *Phelps*, 137 U. S., 528, 536, 11 Sup. Ct., 168, 24 L. Ed., 767.)

This statute clearly prohibits the use of any engine in moving interstate commerce not equipped with a power driving-wheel brake, and the use of any car not equipped with automatic couplers, under a penalty of $100 for each offense; and it just as plainly omits to forbid, under that or any penalty, the use of any car which is not equipped with a power driving-wheel brake, and the use of any engine that is not equipped with automatic couplers. This striking omission to express any intention to prohibit the use of engines unequipped with automatic couplers raises the legal presumption that no such intention existed, and prohibits the courts from importing such a purpose into the act, and enacting provisions to give it effect. The familiar rule that the expression of one thing is the exclusion of others points to the same conclusion. Section 2 of the act does not declare that it shall be unlawful to use any engine or car *not* equipped with automatic couplers, but that it shall be unlawful only to use any car lacking this equipment. This clear and concise definition of the unlawful act is a cogent and persuasive argument against the contention that the use without couplers of locomotives, hand cars, or other means of conducting

interstate traffic, was made a misdemeanor by this act. Where the statute enumerates the persons, things, or acts affected by it there is an implied exclusion of all others. (*Suth. St. Const.*, sec. 227.) And when the title of this statute and its first section are again read; when it is perceived that it was not from inattention, thoughtlessness, or forgetfulness; that it was not because locomotives were overlooked or out of mind, but that it was advisedly and after careful consideration of the equipment which they should have, that Congress forbade the use of cars alone without automatic couplers; when it is seen that the title of the act is to compel common carriers to "equip their cars with automatic couplers * * * and their locomotives with driving-wheel brakes;" that the first section makes it unlawful to use locomotives not equipped with such brakes, and the second section declares it to be illegal to use cars without automatic couplers—the argument becomes unanswerable and conclusive.

Again, this act of Congress changes the common law. Before its enactment, servants coupling cars used in interstate commerce without automatic couplers assumed the risk and danger of that employment, and carriers were not liable for injuries which their employees suffered in the discharge of this duty. Since its passage the employees no longer assume this risk, and, if they are free from contributory negligence, they may recover for the damages they sustain in this work. A statute which thus changes the common law must be strictly construed. The common or the general law is not further abrogated by such a statute than the clear import of its language necessarily requires. (*Shaw* v. *Railroad Co.*, 101 U. S., 557, 565, 25 L. Ed., 892; *Fitzgerald* v. *Quann*, 109 N. Y., 441, 445, 17 N. E., 354; *Brown* v. *Barry*, 3 Dall., 365, 367, 1 L. Ed., 638.) The language of this statute does not require the abrogation of the common law that the servant assumes the risk of coupling a locomotive without automatic couplers with a car which is provided with them.

Moreover, this is a penal statute, and it may not be so broadened by judicial construction as to make it cover and permit the punishment of an act which is not denounced by the fair import of its terms. The acts which this statute declares to be unlawful, and for the commission of which it imposes a penalty, were lawful before its enactment, and their performance subjected to no penalty or liability. It makes that unlawful which was lawful before its passage, and it imposes a penalty for its performance. Nor is this penalty a mere forfeiture for the benefit of the party aggrieved or injured. It is a penalty prescribed by the statute and recoverable by the Government. It is, therefore, under every definition of the term a penal statute. The act which lies at the foundation of this suit—the use of a locomotive which was not equipped with a Miller hook to turn a car which was duly equipped with automatic couplers—was, therefore,

unlawful or lawful as it was or was not forbidden by this statute. That act has been done. When it was done it was neither forbidden nor declared to be unlawful by the express terms of this law. There is no language in it which makes it unlawful to use in interstate commerce a locomotive engine which is not equipped with automatic couplers. The argument of counsel for the plaintiff is, however, that the statute should be construed to make this act unlawful because it falls within the mischief which Congress was seeking to remedy, and hence it should be presumed that the legislative body intended to denounce this act as much as that which it forebade by the terms of the law. An ex post facto statute which would make such an innocent act a crime would be violative of the basic principles of Anglo-Saxon jurisprudence. An ex post facto construction which has the same effect is equally abhorrent to the sense of justice and of reason. The mischief at which a statute was leveled, and the fact that other acts which it does not denounce are within the mischief, and of equal atrocity with those which it forbids, do not raise the presumption that the legislative body which enacted it had the intention, which the law does not express, to prohibit the performance of the acts which it does not forbid. Nor will they warrant a construction which imports into the statute such a prohibition. The intention of the legislature and the meaning of a penal statute must be found in the language actually used, interpreted according to its fair and usual meaning, and not in the evils which it was intended to remedy, nor in the assumed secret intention of the lawmakers to accomplish that which they did not express. (*U. S.* v. *Wiltberger*, 5 Wheat., 76; 5 L. Ed., 37; *Sarlls* v. *U. S.*, 152 U. S., 570; 14 Sup. Ct., 720; 38 L. Ed., 556; *U. S.* v. *Harris*, 177 U. S., 305, 309; 20 Sup. Ct., 609; 44. L. Ed., 780; *Suth. St. Const.*, sec. 208.) The decision and opinion of the Supreme Court in *U. S.* v. *Harris* (177 U. S., 305, 309; 20 Sup. Ct., 609; 44 L. Ed., 780) is persuasive—nay, it is decisive—in the case before us. The question there presented was analogous to that here in issue. It was whether Congress intended to include receivers managing a railroad among those who were prohibited from confining cattle, sheep, and other animals in cars more than twenty-eight consecutive hours without unloading them for rest, water, and feeding, under "An act to prevent cruelty to animals while in transit by railroad or other means of transportation," approved March 3, 1873, and published in the Revised Statutes as sections 4386, 4387, 4388, and 4389. This statute forbids the confinement of stock in cars by any railroad company engaged in interstate commerce more than twenty-eight consecutive hours, and prescribes a penalty of $500 for a violation of its provisions. The plain purpose of the act was to prohibit the confinement of stock while in transit for an unreasonable length of time. The confinement of cattle by receivers operating a railroad was as

injurious as their confinement by a railroad company, and the argument for the United States was that, as such acts committed by receivers were plainly within the mischief Congress was seeking to remedy, the conclusion should be that it intended to prohibit receivers, as well as railroad companies, from the commission of the forbidden acts, and hence that receivers were subject to the provisions of the law. The Supreme Court conceded that the confinement of stock in transit was within the mischief that Congress sought to remedy. But it held that as the act did not by its terms forbid such acts when committed by receivers, it could not presume the intention of Congress to do so, and import such a provision into the plain terms of the law. Mr. Justice Shiras, who delivered the unanimous opinion of the court, said:

> Giving all proper force to the contention of the counsel for the Government, that there has been some relaxation on the part of the courts in applying the rule of strict construction to such statutes, it still remains that the intention of a penal statute must be found in the language actually used, interpreted according to its fair and obvious meaning. It is not permitted to courts, in this class of cases, to attribute inadvertence or oversight to the legislature when enumerating the classes of persons who are subjected to a penal enactment, nor to depart from the settled meaning of words or phrases in order to bring persons not named or distinctly described within the supposed purpose of the statute.

He cited with approval the decision of the Supreme Court in *Sarlls v. U. S.* (152 U. S., 570; 75; 14 Sup. Ct., 720; 38 L. Ed., 556), to the effect that lager beer was not included within the meaning of the term "spirituous liquors" in the penal statute found in section 2139 of the Revised Statutes, and closed the discussion with the following quotation from the opinion of Chief Justice Marshall in *U. S. v. Wiltberger* (5 Wheat., 76; 5 L. Ed., 37):

> The rule that penal statutes are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislative, and not in the judicial, department. It is the legislature, not the court, which is to define a crime and ordain its punishment. It is said that, notwithstanding this rule, the intention of the lawmaker must govern in the construction of penal as well as other statutes. But this is not a new, independent rule, which subverts the old. It is a modification of the ancient maxim, and amounts to this: That, though penal statutes are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be applied so as to narrow the words of the statute, to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature ordinarily used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of words—especially in a penal act—in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute is within its provisions,

so far as to punish a crime not enumerated in the statute, because it is of equal atrocity or of a kindred character with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule in other cases.

The act of March 2, 1893, is a penal statute, and it changes the common law. It makes that unlawful which was innocent before its enactment, and imposes a penalty, recoverable by the Government. Its terms are plain and free from doubt, and its meaning is clear. It declares that it is unlawful for a common carrier to use in interstate commerce a car which is not equipped with automatic couplers, and it omits to declare that it is illegal for a common carrier to use a locomotive that is not so equipped. As Congress expressed in this statute no intention to forbid the use of locomotives which were not provided with automatic couplers, the legal presumption is that it had no such intention, and provisions to import such an intention into the law and to effectuate it may not be lawfully enacted by judicial construction. The statute does not make it unlawful to use locomotives that are not equipped with automatic couplers in interstate commerce, and it did not modify the rule of the common law under which the plaintiff assumed the known risk of coupling such an engine to the dining car.

There are other considerations which lead to the same result. If we are in error in the conclusion already expressed, and if the word "car," in the second section of this statute, means locomotive, still this case does not fall under the law, (1) because both the locomotive and the dining car were equipped with automatic couplers; and (2) because at the time of the accident they were not "used in moving interstate traffic."

For the reasons which have been stated, this statute may not be lawfully extended by judicial construction beyond the fair meaning of its language. There is nothing in it which requires a common carrier engaged in interstate commerce to have every car on its railroad equipped with the same kind of coupling, or which requires it to have every car equipped with a coupler which will couple automatically with every other coupler with which it may be brought into contact in the usual course of business upon a great transcontinental system of railroads. If the lawmakers had intended to require such an equipment it would have been easy for them to have said so, and the fact that they made no such requirement raises the legal presumption that they intended to make none. Nor is the reason for their omission to do so far to seek or difficult to perceive. There are several kinds or makes of practical and efficient automatic couplers. Some railroad companies use one kind; others have adopted other kinds. Couplers of each kind will couple automatically with others

of the same kind or construction. But some couplers will not couple automatically with couplers of different construction. Railroad companies engaged in interstate commerce are required to haul over their roads cars equipped with all these couplers. They can not relieve themselves from this obligation or renounce this public duty for the simple reason that their cars or locomotives are not equipped with automatic couplers which will couple with those with which the cars of other roads are provided, and which will couple with equal facility with those of their kind. These facts and this situation were patent to the Congress when it enacted this statute. It must have known the impracticability of providing every car with as many different couplers as it might meet upon a great system of railroads, and it made no such requirement. It doubtless knew the monopoly it would create by requiring every railroad company to use the same coupler, and it did not create this monopoly. The prohibition of the statute goes no farther than to bar the handling of a car "not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the car." It does not bar the handling and use of a car which will couple automatically with couplers of its kind because it will not also couple automatically with couplers of all kinds, and it would be an unwarrantable extension of the terms of this law to import into it a provision to this effect. A car equipped with practical and efficient automatic couplers, such as the Janney couplers or the Miller hooks, which will couple automatically with those of their kind, fully and literally complies with the terms of the law, although these couplers will not couple automatically with automatic couplers of all kinds or constructions. The dining car and the locomotive were both so equipped. Each was provided with an automatic coupler which would couple with those of its kind, as provided by the statute, although they would not couple with each other. Each was accordingly equipped as the statute directs, and the defendant was guilty of no violation of it by their use.

Again, the statute declares it to be unlawful for a carrier "to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped," etc. It is not, then, unlawful, under this statute, for a carrier to haul a car not so equipped which is either used in interstate traffic solely, or which is not used in any traffic at all. It would be no violation of the statute for a carrier to haul an empty car not used to move any interstate traffic from one end of its railroad to the other. It would be no violation of the law for it to haul such a car in its yards, on its side track, to put it into its trains, to move it in any manner it chose. It is only when a car is "used in moving interstate traffic" that it becomes unlawful to haul it unless it is equipped as the statute prescribes. On the day of this accident the dining car in this case was standing empty on the side track. The

defendant drew it to a turntable, turned it, and placed it back upon the side track. The accident occurred during the performance of this act. The car was vacant when it went to the turntable, and vacant when it returned. It moved no traffic on its way. How could it be said to have been "used in moving interstate traffic" either while it was standing on the side track or while it was going to and returning from the turntable? If the defendant had drawn it vacant over every foot of its railroad, it would not have been engaged in moving interstate traffic, and it would not have fallen under the ban of the statute. How can it thus fall because it was moved in the same way over a small portion of the road? The argument of counsel for the plaintiff is that because it had been used in moving interstate traffic on its way from San Francisco to Promontory, and because it was the intention of the defendant to put it to the same use in a few hours, when a west-bound train arrived, it was impressed with the use of moving such traffic in the interim. But this statute must be read not only in the light of the rules of construction to which we have adverted in the earlier part of this opinion, but also in view of the limitations upon the power of Congress in this respect. It is by virtue of the power granted to Congress to "regulate commerce among the States," and by virtue of that authority alone, that this statute was enacted and has efficacy. Congress had neither the authority nor the purpose to interfere with or to touch by this act anything except commerce among the States. Is the turning of a vacant car which its owner intends to use at some future time in moving interstate traffic any part of commerce among the States? Does the intention of the owner as to a future use of an implement of transportation affect the character of the act of turning this car? If the defendant had intended to use this dining car for traffic within the State of Utah only, if it had intended to send it to the shop to be destroyed or repaired, or if, after the car was turned, it had changed its intention and concluded that it would not use it to move interstate traffic, would any of these intentions or this change of purpose have affected the act of turning the car, and have impressed it with a use in interstate commerce or intrastate commerce? The only answer to these questions is a negative one, and, if this be true, then the intention of the defendant to use this car at some future time in interstate commerce would not make the act of turning it a part of such commerce, nor bring it under the ban of the act of March 2, 1893. The opinion and decision of the Supreme Court in *Coe* v. *Town of Errol* (116 U. S., 517, 525, 526; 6 Sup. Ct., 475; 29 L. Ed., 715) lend strong support to this view. In that case the owners of logs were cutting and transporting them for the purpose of exporting them from New Hampshire to Maine. The logs had been cut, drawn to and deposited in and on the banks of Clear Stream, to be floated down

that stream and down the Androscoggin River to the State of Maine, and the owners intended to transport them in this way to that State. They were lying in the town of Errol, awaiting water sufficient to float them down the stream. The Supreme Court held that they had not yet become subjects of interstate commerce; that they would not become such until they were "committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State;" and that the fact that their owners intended to export them could not change their situation, because the owners might change their intention. If commodities do not become articles of interstate commerce until they start on their final passage to another State, cars and engines can not be "used in moving interstate traffic" until they receive articles of interstate traffic, or start to carry them from one State to another, and the act of turning a vacant car at an intermediate station can not be the use of that car in moving such traffic. This is the effect of the decision of the supreme court of appeals of Virginia in *Norfolk and W. R. Co.* v. *Com.* (24 S. E., 838; 34 L. R. A., 105; 57 Am. St. Rep., 827). That court held in that case, upon the authority of *Coe* v. *Errol*, that a train of empty coal cars on its way to procure a load of coal which the carrier intended to transport with these cars from one State to another was not engaged in interstate commerce, and would not be until it was loaded with the articles of such commerce, to be carried to another State or started on the way. Speaking of the effect of the intention of the carrier to use the cars in moving interstate traffic, that court said:

> The common carrier has the same right to change his mind, and ship on other cars than those which he may have provided for that purpose, and the cars which were intended for that purpose may never be used. The rule fixed by the Supreme Court in the one case seems equally applicable to the other. (*U. S.* v. *Boger*, D. C., 85 Fed., 425, 432; *Kelley* v. *Rhoads*, Wyo., 63 Pac., 935.)

The power of Congress over this subject was limited to the regulation of commerce among the States. It intended to exercise that power, but not to transgress its bounds. It prohibited the hauling of cars used in moving interstate traffic unless equipped as the act directs. The intention to use cars for that purpose does not constitute such a use, because that intention may change. (*Coe* v. *Town of Errol*, 116 U. S., 526; 6 Sup. Ct., 475; 29 L. Ed., 715; *Norfolk and W. R. Co.* v. *Com.*, Va., 24 S. E., 838; 34 L. R. A., 105; 57 Am. St. Rep., 827.) The fact that such cars have been or will be so used does not constitute their use in moving interstate traffic, because the prohibition is not of the hauling of cars that have been or will be used in such traffic, but only of those used in moving that traffic. Cars loaded with articles of interstate commerce, and started toward their ultimate destination, whether in trains, in yards, or on side tracks, may well be

held to come within the terms of this statute and the intent of Congress. But vacant cars which are not and may never be so used can not be held to come within the fair import of the terms of this law either because their owner intends to use them for that purpose at some future time or because they have been or will be so used. Empty cars in repair shops, in yards, on side tracks, those in use to transport traffic within a State, and for that purpose alone, are not in use to move articles of interstate commerce, and do not fall under the ban of this law. Neither the empty dining car standing upon the side track nor the freight engine which was used to turn it at the little station in Utah was then used in moving interstate traffic, within the meaning of this statute, and this case did not fall within the provisions of this law.

The judgment below must accordingly be affirmed, and it is so ordered.

THAYER, *Circuit Judge:*

I am unable to concur in the conclusion, announced by the majority of the court, that the act of Congress of March 2, 1893 (27 Stat., 531, c. 196), does not require locomotive engines to be equipped with automatic couplers; and I am equally unable to concur in the other conclusion announced by my associates that the dining car in question at the time of the accident was not engaged or being used in moving interstate traffic.

In my judgment, it is a very technical interpretation of the provisions of the act in question, and one which is neither in accord with its spirit nor with the obvious purpose of the lawmaker, to say that Congress did not intend to require engines to be equipped with automatic couplers. The statute is remedial in its nature; it was passed for the protection of human life; and there was certainly as much, if not greater, need that engines should be equipped to couple automatically, as that ordinary cars should be so equipped, since engines have occasion to make couplings more frequently. In my opinion, the true view is that engines are included by the words "any car," as used in the second section of the act. The word "car" is generic, and may well be held to comprehend a locomotive or any other similar vehicle which moves on wheels; and especially should it be so held in a case like the one now in hand, where no satisfactory reason has been assigned or can be given which would probably have influenced Congress to permit locomotives to be used without automatic coupling appliances.

I am also of opinion that, within the fair intent and import of the act, the dining car in question at the time of the accident was being hauled or used in interstate traffic. The reasoning by which a contrary conclusion is reached seems to me to be altogether too refined

and unsatisfactory to be of any practical value. It was a car which at the time was employed in no other service than to furnish meals to passengers between Ogden and San Francisco. It had not been taken out of that service, even for repairs or for any other use, when the accident occurred, but was engaged therein to the same extent that it would have been if it had been hauled through to Ogden, and if the accident had there occurred while it was being turned to make the return trip to San Francisco. The cars composing a train which is regularly employed in interstate traffic ought to be regarded as used in that traffic while the train is being made up with a view to an immediate departure on an interstate journey as well as after the journey has actually begun. I accordingly dissent from the conclusion of the majority of the court on this point.

While I dissent on the foregoing propositions, I concur in the other view which is expressed in the opinion of the majority, to the effect that the case discloses no substantial violation of the provisions of the act of Congress, because both the engine and the dining car were equipped with automatic coupling appliances. In this respect the case discloses a compliance with the law, and the ordinary rule governing the liability of the defendant company should be applied. The difficulty was that the car and engine were equipped with couplers of a different pattern, which would not couple, for that reason, without a link. Jenney couplers and Miller couplers are in common use on the leading railroads of the country, and Congress did not see fit to command the use of either style of automatic coupler to the exclusion of the other, while it must have foreseen that, owing to the manner in which cars were ordinarily handled and exchanged, it would sometimes happen, as in the case at bar, that cars having different styles of automatic couplers would necessarily be brought in contact in the same train. It made no express provision for such an emergency, but declared generally that, after a certain date, cars should be provided with couplers coupling automatically. The engine and dining car were so equipped in the present instance, and there was no such violation of the provisions of the statute as should render the defendant company liable to the plaintiff by virtue of the provisions contained in the eighth section of the act. In other words, the plaintiff assumed the risk of making the coupling in the course of which he sustained the injury. On this ground I concur in the order affirming the judgment below.

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DEFECTIVE SAFETY APPLIANCES.

LARABEE v. NEW YORK, N. H. AND H. R. CO.

(Supreme judicial court of Massachusetts, Hampden County, December 2, 1902.)

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SERVANT—INJURIES—RAILROAD CARS—AUTOMATIC COUPLERS—LOCOMOTIVE TENDER. St. 1895, p. 412, c. 362, section 2 (R. L. c. 111, sec. 203), provides: "No railroad corporation shall haul or permit to be hauled or used on its lines * * * any car which is not equipped with couplers, coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." Act March 2, 1893, c. 196, section 8, 27 Stat., 532 (U. S. Comp. St. 1901, p. 3176), provides that "any employee of such corporation who may be injured by any locomotive, car, or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk," etc. *Held*, that the tender of a locomotive is not a car within the statute.

Exceptions from superior court, Hampden County; Maynard, judge.

Action by George Larabee against the New York, New Haven and Hartford Railroad Company. Verdict for plaintiff, and defendant brings exceptions. Exceptions sustained.

Argued before HOLMES, C. J., and KNOWLTON, MORTON, LATHROP, BARKER, HAMMOND, and LORING, JJ.

J. B. Carroll and *W. H. McClintock*, for plaintiff. *W. S. Robinson*, for defendant.

HOLMES, C. J.:

This is an action for personal injuries caused by the catching of the plaintiff's hand between a car and the tender of an engine when he was trying to couple the two. The plaintiff had a verdict, and his case is here on the defendant's exceptions. The car was equipped with an automatic coupler, as required by St. 1895, p. 412, c. 362, section 2 (R. L. c. 111, section 203), but the tender was not, so that the coupling had to be done in the old way with a link and pin. The plaintiff's case was that the tender should have been equipped in the same manner as the car.

The section cited copies, for traffic within the State, the provisions of United States statutes, act March 2, 1893, c. 196, section 2, 27 Stat., 531 (U. S. Comp. St., 1901, p. 3174), as to interstate commerce. The

material words are "No railroad corporation shall haul or permit to be hauled or used on its lines * * * any car which is not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." By a later section it is enacted that "any employee of such corporation who may be injured by any locomotive, car, or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such corporation after the unlawful use of such locomotive, car, or train has been brought to his knowledge." Act March 2, 1893, c. 196, section 8, 27 Stat., 532 (U. S. Comp. St., 1901, p. 3176). The defendant asked a ruling that a tender of a locomotive is not a car within the meaning of the act. The refusal of this raises the only question with which it is necessary to deal.

The court is of opinion that the ruling requested should have been given. It may be, as some of us think, that the rear end of the tender is within the policy and object of the act, but the word "car" in its ordinary use and acceptance does not include it. On the contrary, it excludes the tender as obviously as it does the engine. It always is dangerous to give unusual meanings to the words of a document on the strength of an imagination of what the writer had in mind. Moreover, the other language of the section indicates that, whatever the evil which the legislature sought to prevent, it had in mind only cars properly so called. The prohibition "no railroad corporation shall haul" hardly would be so expressed if it had in conscious view not merely the cars which are regarded as the inert objects of traction by a separate engine from which they are detached daily, but also the tenders which are so much more closely associated with the source of power as almost to be regarded as one with it, and which only exceptionally and with more or less difficulty are taken apart from it.

It is said that the word has been interpreted in the same way by the United States circuit court. (15 Interst. Com. Comm. R., 67.)

Exceptions sustained.

O

DEFECTIVE SAFETY APPLIANCES.

MALLOTT, RECEIVER OF THE T. H. & I. R. R. CO., v. HOOD.

(In the supreme court of Illinois. Decided June —, 1902.)

1. A brakeman was injured while attempting to couple cars because of the failure of the carrier to provide grab irons or hand holds on the ends of an empty car which was part of a train in course of transit from East St. Louis, Ill., to Indianapolis, Ind.; *Held*, That the Federal safety appliance statute applies to such empty car, as it was being "used" in interstate commerce.
2. An employee does not assume all the risks incident to his employment, but only to such as are usual, ordinary, and remain so incident after the master has taken reasonable care to prevent or remove them, or, if extraordinary, such as are so obvious and expose him to danger so imminent that an ordinarily prudent and careful man would anticipate injury as so probable that in view of it he would not enter upon or remain in the employment.

Mr. Justice Boggs delivered the opinion of the court:

The plaintiff in error, on the 27th day of December, 1897, was operating the Terre Haute and Indianapolis Railroad Company in his capacity as receiver, by appointment of the circuit court of the United States for the district of Indiana and the circuit court of the United States for the southern district of Illinois. On that day the defendant in error, who was in the employ of said receiver as rear brakeman on a freight train which said receiver was moving over said road from East St. Louis, in the State of Illinois, to Indianapolis, in the State of Indiana, while attempting, at the side track at Greenup, Ill., to couple one of the cars which had been placed in the train at East St. Louis to a car standing on the switch at Greenup, had his right hand caught between the "deadwood" of the bumpers of the cars and so badly crushed and mangled that his hand had to be amputated. He brought this action in case against the receiver to recover damages for the injuries thus received, and recovered a judgment in the sum of $3,500, which has been affirmed by the appellate court for the third district, on appeal. This writ of error has been sued out by the receiver.

Two grounds of recovery were relied on. The first was that the car which had been placed in the train at East St. Louis, Ill., to be transported or hauled to Indianapolis, Ind., which the defendant in error was attempting to couple to another car, was being used in interstate commerce by the receiver, and was not provided with grab irons or hand holds in the ends and sides thereof, as is required by

section 4 of the act of Congress approved March 2, 1893, which section is as follows: "That from and after the 1st day of July, 1895, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or hand holds in the ends and sides of each car for greater security to men in coupling and uncoupling cars"—and that the injury to the defendant in error resulted from the failure to so have grab irons or hand holds on the ends of the car. As to this ground of recovery, the argument of counsel for the plaintiff in error is, that the evidence did not bring the case within the terms of the Federal statute, and did not, by a preponderance thereof, show the car was not provided with the grab irons or hand holds, and that the court erred in not giving the jury an instruction defining interstate commerce.

In support of the first of these contentions it is urged there is no evidence to show that the car in question contained any commodities to be transported from one State to another. The trial court was not asked to hold, as matter of law, the evidence was insufficient to warrant recovery, and to direct a peremptory verdict in favor of the plaintiff in error receiver. The question, therefore, does not arise upon the record whether, as matter of law, the court erred in submitting the case to the jury, and the action of the circuit court and the appellate court is conclusive as to the sufficiency of the proof to support the verdict. Whether the conflict in the testimony on the question whether the car was supplied with grab irons or hand holds was properly decided by the jury was also a question of fact, and is not open to review in this court.

It appeared in the proof the receiver was operating a line of railway from East St. Louis, in the State of Illinois, to Indianapolis, in the State of Indiana, and that the car in question was placed in the train at East St. Louis and was to be transported or hauled to Indianapolis. The evidence tended to show that the train was loaded with stock and merchandise, and it is insisted the inference fairly arose that the car was loaded either with stock or merchandise. The danger to brakemen which the Federal statute was designed to obviate is the same whether the car be loaded or empty. The statute applies not only to cars that are loaded, but to all cars, whether empty or loaded, which are being "used" in interstate commerce. The court was not asked to define interstate commerce to the jury, and we do not conceive the position of plaintiff in error to be correct that it was the duty of the court, acting on its own motion, to give an instruction of that character. If counsel for the receiver deemed it necessary that the jury should be enlightened on the point, they should have asked such an instruction to be given by the court. (*City of Chicago* v. *Keefe*, 114 Ill., 222; *Drury* v. *Connell*, 177 id., 43.)

Second. The second ground of recovery was, that the receiver negligently permitted the switch and track where the defendant in error was injured to become and remain "slanting and sidling," and thereby rendered it an unsafe and dangerous place for the defendant in error to stand when in the discharge of his duties as a brakeman, and by reason of such negligence the defendant in error could not hold his footing, but slipped and fell, and thereby his hand was caught between the bumpers of the cars. The argument in the brief in behalf of the plaintiff in error does not present or discuss any alleged error of law arising out of this branch of the case. Whether the condition of the switch or siding was well known to the defendant in error, or whether it was proven the switch or siding was "slanting or sidling," or that the statement or exclamation of the defendant in error made at the instant of receiving his injury indicated that his hand had been caught because of his own negligence or without the negligence of any one, are questions of fact only, and are in nowise preserved as questions of law for review in this court.

It is urged the court erred in giving instructions Nos. 4 and 7 at the request of the defendant in error. Instruction No. 4 is as follows:

> The court instructs the jury that if you believe, from the evidence, that the plaintiff, while in the employ of the defendant as freight brakeman and in the discharge of his duties as such brakeman, attempted to couple together two freight cars on the defendant's road, and in so doing used that care and caution for his own safety that the ordinarily careful man would have exercised, and if you believe, from the evidence, that the side track where the cars were was slanting and sidling, and as a result thereof not reasonably safe to work, then and in that case, if you believe, from the evidence, that the plaintiff was injured, as charged in the declaration, as a result thereof, and that the unsafe condition of the track, if you believe, from the evidence, it was so unsafe, was caused by the defendant not exercising reasonable care to provide a reasonable safe track, it will be your duty to find for the plaintiff.

The instruction advised the jury that if they believed that certain facts specifically recited, being the facts relied upon to constitute the negligence of the receiver, had been proven by the evidence, and further believed from the evidence that the plaintiff was injured in the manner charged in the declaration, as the result of such negligence, their verdict should be for the plaintiff. The reference thus made to the declaration is not objectionable. (*Chicago and Alton Railroad Co.* v. *Harrington*, 192 Ill., 9.)

Prior to the submission of the case to the jury the defendant in error, by leave of the court, dismissed the suit as to the third and fourth counts of the declaration, and by like leave filed an additional count. It is urged instruction No. 4 was erroneous in failing to advise the jury that the allegations of the third and fourth counts of the declaration had been abandoned. The record does not disclose in what manner the declaration was amended under the order dismissing the third and fourth counts and giving leave to file an amended count.

Therefore no error affirmatively appears and none can be presumed. On the contrary, the presumption that the proceedings were regularly and properly conducted must prevail.

The purpose of the seventh instruction was to advise the jury that the defendant in error, as an employee of the receiver, did not assume the risks of dangers arising out of the negligence of the employer. Though, perhaps, not entirely accurate, the instruction in substance announces the doctrine laid down by this court in *Chicago and Alton Railroad Co.* v. *House* (172 Ill., 601), as follows (p. 605):

> An employee does not assume all the risks incident to his employment, but only to such as are usual, ordinary, and remain so incident after the master has taken reasonable care to prevent or remove them, or if extraordinary, such as are so obvious and expose him to danger so imminent that an ordinarily prudent and careful man would anticipate injury as so probable that in view of it he would not enter upon or remain in the employment.

The judgment must be and is affirmed.

O

DEFECTIVE SAFETY APPLIANCES.

O'CONNELL v. PENNSYLVANIA COMPANY.

(Circuit court of appeals, sixth circuit. December 2, 1902. 118 Fed. Rep., 989.)

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1. REVIEW ON APPEAL—MATTERS OF PRACTICE—DISCRETION IN PERMITTING CROSS-EXAMINATION.

While conceding to the trial court wide discretion in the suspension or enforcement of the rule limiting cross-examination to matters testified to in chief, and in respect to the order in which evidence is introduced, an appellate court must reserve the right to grant a new trial, even for the relaxation of such rules of practice, when necessary, to prevent serious injury to the rights of a party.

2. EVIDENCE—CONDITION OF CAR—SUFFICIENCY OF IDENTIFICATION.

A witness testified that in company with one R. he examined a certain numbered Erie car on the morning after plaintiff had been injured thereon, and described its condition. R. testified that he examined an Erie car with the previous witness, in the yards of defendant company, but did not remember its number. *Held*, that he sufficiently identified the car, in connection with the testimony of the previous witness, to render his testimony as to its condition admissible.

3. ACTION FOR INJURY TO SWITCHMAN—DEFECTIVE CAR—SUFFICIENCY OF EVIDENCE UNDER OHIO STATUTE.

By the Ohio statute (Bates's Ann. St., § 3365-21) evidence of a defective appliance on a railroad car and that an employee of the company was injured by reason of such defect is made prima facie evidence of negligence on the part of the company. In an action by a switchman to recover for an injury caused by his falling while attempting to climb on a car in the night he testified that in attempting to put his foot on the step or stirrup it struck the side and slipped off, and that from the way his "foot hit it it was slanting way back." Witnesses who examined the car the next morning while standing in the yards testified that one of the steps was bent back under the sill. The car had been switched onto an intersecting track during the night, and the question whether the step on which plaintiff tried to place his foot was the one described by such witnesses, or the one on the opposite corner of the car, depended upon whether the car had been transferred over one or the other of two connecting tracks, upon which point there was no evidence, and on the conclusion of plaintiff's case a verdict was directed for defendant. *Held*, that the evidence was sufficient to require the submission of the case to the jury; that in the absence of evidence from defendant to show over which track the car had been transferred, which was a fact peculiarly within its knowledge, the jury might reasonably infer that the step found defective the next morning was the one which plaintiff attempted to use.

In error to the circuit court of the United States for the eastern division of the northern district of Ohio.

The plaintiff, while a switchman in the service of the Pennsylvania Railroad Company, sustained the loss of a leg. For this injury he brought this suit, claiming that his foot slipped from a bent and damaged iron step at one end of a car he was climbing in discharge of his duties, and that his foot was thereby thrown on the rail in front of a revolving wheel and crushed. At the conclusion of the plaintiff's evidence, and before any evidence by the defendant, the court below instructed the jury to find for the railroad company.

Charles Koonce, jr., for plaintiff in error.
William C. Bayle, for defendant in error.
Before LURTON, DAY, and SEVERENS, *Circuit Judges*.

LURTON, *Circuit Judge*, after making the foregoing statement of the case, announced the opinion of the court.

Three errors are assigned: First. In the admission of evidence in chief for the defendant in cross-examination of the witness Forney, a witness introduced by the plaintiff for the sole purpose of proving the number of the car from which the plaintiff fell. Second. In the exclusion of the testimony of the witness Richards, touching the identification and condition of the car from which plaintiff fell. Third. As to the action of the court in directing a verdict. These may be treated in the order stated.

1. The evidence tended to show that the plaintiff was a switchman employed in switching ore cars in a yard assigned to the National Steel Company at Youngstown, Ohio. At about 7 o'clock on the night of December 8, 1899, while attending to his duties, plaintiff opened a switch to admit a train of ore cars being pushed by an engine, the object being to transfer the cars from one part of the yard to another. After setting the switch for the main track, he gave the signal to the engineer to "come ahead." When the first car reached the point where he was standing, he attempted to climb on by reaching out and grasping the handhold and then springing so as to place his foot in the stirrup at what was the then forward and westward end of the car, the car being the first, or front, car as the train was then moving. Plaintiff testified that the train at the time was moving at a speed of not exceeding 3 miles per hour. The tracks at the locus in quo run east and west, and the train of cars was being pushed westwardly. Plaintiff was on the north side of the track. He testified, among other things, as follows:

I had my lantern on my right arm; put my hand up for the handhold; got it all right, and sprang for the step; I just got a glimpse of it, and saw that there was a step there, and my foot slipped off—hit the side of the step and slipped off—and fell on the rail.

He further said that the step he undertook to place his foot in was on the corner of the car—the northwest corner as the car then stood; that it was an iron step, bolted on the sill, and hung below the outer edge of

the bottom of the car; and that such steps are a part of the ordinary equipment of freight cars. When asked as to the condition of the step and the circumstances of the accident, the plaintiff, among other things, said "that his foot hit the side of the step," "on the north side or on the west side; and, from the way my foot hit it, it was slanting way back, the same as I would put my foot up, and felt as though it was slanting back toward the end sill of the car." For the purpose of identifiying the car from which he fell plaintiff introduced one Elias Forney, a member of the switching crew, and asked Forney if he knew the number of the first car in the train which was being pushed up the track at the time he (O'Connell) sustained his injury, and to give any other marks or words by which it was distinguished. The witness answered that the number of the car was 47923, and that it was an Erie car. The plaintiff then stopped and turned the witness over to the other side for cross-examination. On cross-examination he stated that he discovered the number and description of the car at between 11 and 12 o'clock the night of O'Connell's injury, having first gone with O'Connell to the hospital. He said that the car had been shifted while he was gone, but that he got its number from the conductor's report and then hunted it up and saw it was an Erie car. In further cross-examination the following occurred:

Q. Did you examine the northwest step of the car?—A. Yes, sir.

Q. Was that step bent back on the car you examined?—A. No, sir.

Q. What was the position of the step on car 47923 when you saw it?—A. The step was solid.

Q. Straight down?—A. Yes, sir; bolted on the side sill with bolts.

All this was objected to by the plaintiff in error as not legitimate cross-examination, but evidence in chief. It was, however, admitted, over objection, as proper cross-examination. This statement as to the condition of the step on the car examined by the witness was plainly evidence in chief. The witness should have been recalled if the defendant so desired, and thus made the witness of the defendant as to the condition of the step of the car he had identified by number and name as the car from which plaintiff fell. (*Montgomery* v. *Insurance Co.*, 97 Fed., 913, 38 C. C. A., 553, 557; *Wills* v. *Russell*, 100 U. S., 621, 625, 25 L. ed., 607; *Houghton* v. *Jones*, 1 Wall., 702, 706, 17 L. ed., 503.) The cases cited above are all cases where the trial court had properly applied the rule limiting the cross-examination to the matters opened up by the examination in chief, and in *Wills* v. *Russell* the court calls attention to the fact "that the mode of conducting trials, and the order of introducing evidence, and the time when it is to be introduced, are matters properly belonging very largely to the practice of the court where the matters of fact are tried by a jury." "Cases," said the court, "not infrequently arise where the convenience of the witness, or the court, or the party producing the witness will be promoted by a relaxation of the rule to enable the witness to

be discharged from further attendance; and if the court, in such a case, should refuse to enforce the rule, it clearly would not be ground of error, unless it appeared that it worked serious injury to the opposite party."

While we are disposed to concede to a trial judge wide limits in the suspension or enforcement of the rule in reference to the proper limits of a cross-examination and in respect to the order in which evidence is to be introduced, yet we must reserve to this, as a reviewing tribunal, such authority in respect to even such questions of practice as that any serious injury to the rights of the party complaining of the relaxation of the rule may be corrected by granting a new trial, if necessary. In the instance before us the case turned upon the question as to whether the plaintiff's injury was due proximately to a defective appliance. Without having asked the witness Forney a single question in respect to this matter, the defendant was permitted to affirmatively show that no such defect existed as that claimed by the plaintiff. A consequence was that, upon this very affirmative evidence, the defendant, at the close of plaintiff's evidence, asked and obtained a direction to find for the defendant in error. This verdict was directed, as is shown by the charge of the court, upon the ground that this positive evidence, delivered by Forney, that the step was not defective, was not so contradicted by the evidence of other witnesses as to make a case for the jury. We are not prepared to say that in this particular instance the suspension of the usual and proper rule in regard to the limits of a cross-examination did not operate to the very serious injury of the plaintiff's case. Certain it is that no reason appears which appealed to the discretion of the trial judge. Inasmuch, however, as the case must be reversed upon other grounds, we reserve the question as to whether the action of the court in this instance would, independent of any other ground, be reversible error.

2. The evidence of the plaintiff's witness Watkins Richards touching the defective condition of a step on the corner of Erie car No. 47923 was erroneously excluded. The plaintiff's witness William Edwards had already testified that on the morning after the injury to O'Connell he and Watkins Richards had together examined Erie car No. 47923, and found the step on the northeast corner of the car, as it stood when examined, bent backward against the sill. Richards was then called. He did not remember the number of the car, and could only identify the car examined as an Erie car in the yards of the defendant company and the same car which witness and William Edwards had examined together. We think this was enough to permit the witness to testify as to the condition of the car step thus examined. Neither do we think the examination made by Richards was so remote from the time of the accident as to justify its exclusion altogether. The injury had occurred at about 7 p. m. of the previous evening, and

this inspection by Edwards and Richards occurred between 8 and 9 the following morning. The time which had elapsed between the injury and this inspection was matter for consideration in respect to the probative effect of the evidence, and was a question for the jury under proper instruction. But the inspection was not so remote as to justify its entire exclusion. The court had already, over objection, admitted the evidence of the witness Edwards, whose inspection was made at the same time; and we can not think the very cautious trial judge could have rested his ruling upon this question of remoteness, but rather upon the supposed insufficiency of the identification of either the car examined or of the particular step, as the step in question.

3. It follows, from the error in excluding the evidence of the witness Richards, that the court erred in directing a verdict for the defendant. Independently, however, of the excluded evidence referred to, we think there was a case for the jury. The plaintiff was an employee of a railroad corporation, and claims to have been injured in Ohio by a defective appliance upon a railroad car in use upon the railroad of the defendant company. His case is therefore within the terms of the Ohio statute of April 2, 1890, being now section 3365–21, Bates' Ann. Rev. St. Ohio. This statutory provision so far changes the ordinary rule of evidence in actions governed by the act as to constitute evidence of such a defect and of an injury caused thereby to an employee "prima facie evidence of negligence on the part of such corporation." (*Felton* v. *Bullard*, 37 C. C. A. 1–4, 94 Fed., 781; *Pennsylvania Co.* v. *McCann*, 54 Ohio St., 10, 42 N. E., 768, 31 L. R. A., 651, 56 Am. St. Rep., 695.) The proof that plaintiff was an employee, and that he sustained an injury while in the discharge of his duty, carries with it no presumption of negligence on the part of the defendant company, either at common law or under the Ohio act cited above, although a different rule may prevail as to a passenger. (*Patton* v. *Railway Co.*, 179 U. S., 658, 21 Sup. Ct., 275, 45 L. ed., 361; *Railway Co.* v. *Barrett*, 166 U. S., 617, 17 Sup. Ct., 707, 41 L. ed., 1136.)

Under the Ohio statute it devolves upon a railroad employee suing for an injury due to a defective car, engine, or appliance to show not only an injury, but that it was caused by such a defect. The operation of the statute is at this stage of the case to relieve such employee from the further duty, which at common law would rest upon him, of going on and showing that the company had knowledge of such defect at or before the injury, or, if diligent, ought to have had knowledge. The trial judge, as we learn from his charge, was of opinion that there was no such evidence of a defective step as to justify a jury in finding the plaintiff's injury was proximately caused by such a step. We are not prepared to say that the personal testimony of the plaintiff tended sufficiently to establish a defect in the step he was endeavoring to use

when he fell. The learned trial judge regarded his evidence as at most amounting to an opinion or a conjecture based upon facts not constituting more than a bare scintilla, and as not, therefore, constituting that degree of evidence legally justifying a finding that there was a defective step as surmised by the plaintiff.

We are not prepared to disagree with the court below in this view of the plaintiff's personal testimony, considered apart from all other evidence, circumstantial and direct. "It is not sufficient for the employee to show that the employer may have been guilty of negligence. The evidence must point to the fact that he was. And when the testimony leaves the matter uncertain, and shows that any one of a half dozen things may have brought the injury, for some of which the employee is responsible and for some of which he is not, it is not for the jury to guess between these half dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion." (*Patton* v. *Railway Co.*, 179 U. S., 658, 663; 21 Sup. Ct., 275; 45 L. ed., 361.) But there was very direct evidence that a defective and bent step was found on the morning after the accident upon an Erie ore car standing in the ore yard at Youngstown, and that the car bore the number 47923; and also evidence tending to show that the plaintiff had fallen from that very car. But it is said that there was no sufficient identification of the step from which plaintiff fell as the defective step found on car No. 47923. The position of the car had been in the meantime shifted, and some thirteen hours had elapsed between the injury and the examination of the car by the plaintiff's witnesses. Plaintiff tried to climb onto the front car of a string being pushed by an engine.

The track on which the train was moving was an east and west track, and the train was being pushed west. The plaintiff stood on the north side and grabbed the hand hold on the front end of the first car that passed him and attempted to place his foot in the step at the corner of the car. If, therefore, there was a defective step which proximately contributed to his fall and injury, it must have been the step on the northwest corner of car No. 47923 as that car stood at the time of his injury. After the accident the car was moved to the ore dump, and then back into the yard, and when examined by the witnesses Edwards and Rosevear was standing on a track running north and south. The defective step testified to by all of these witnesses was the northeast corner step as the car stood on the north and south tracks when the witnesses found it. No other step was defective. There was evidence showing that there were two routes by which the car might have been carried to the ore dump and brought back to the yard. One of these routes was over a track called the "Horn," in which event the car would be completely turned around, and the northwest step would become the southwest step. The other route was around by the office

track, in which case the northwest step would be the northeast step—the very step found injured. The defect in the case made for the plaintiff, it is said, lies in the fact that there was no testimony showing which route had been pursued by this car, and that if, in fact, the route around the "Horn" was pursued, the step nearest plaintiff when he fell would be the southwest and not the northeast step as the car stood after being so shifted. Now, the ultimate fact to be proved by this plaintiff is that his injury was caused by a defective metal step on the corner of the car which he undertook to ascend.

If the jury should believe the statement of the plaintiff himself that he grabbed a handhold on the northwest corner of a car moving west past him, and that his foot failed to secure a standing upon the step at that corner of the car because it struck something which felt like the side bar of a step bent away from him and not hanging perpendicularly with and below the side sill of the car, it would afford a basis for at least a reasonable conjecture that the step in question was in some way defective. Conceding, however, that this conjecture, standing only upon the slender foundation found in the feeling, surmise, or opinion of the plaintiff, is not in itself such a solid fact as to be a safe basis for a judgment, we are next to inquire whether the fact that upon the next morning one of the steps upon the car in question was found to be in such a defective condition as to invite just such a catastrophe as that which occurred is not in itself a fact pointing to that step as the cause of the accident, all the other steps of that car being in sound condition. It must be admitted, of course, that it is possible that the defective step found the following morning upon the car which plaintiff was climbing might not have been the step near the plaintiff, and that the step he missed was in fact a sound step, and his slip due to some carelessness of his own in trying to reach it. But this solution is dependent chiefly, if not altogether, upon which route of the two possible routes was in fact taken by the car after the accident in going to and coming from the ore dump. But if the car took the route around by the "Horn," so that the northwest corner of the car at the time of the accident would be the southwest corner after this shifting, it was a fact peculiarly within the knowledge of the defendant company, and a fact which, in the situation of the evidence, they were, in our opinion, called upon to show, for otherwise the conclusion might be reasonably drawn by the jury that the defective step found on the car inspected the next morning was the step nearest the plaintiff the night before.

We have deemed it necessary to present this view of the deductions of fact which may be legally drawn from the evidence actually submitted on the trial, because the evidence of the witness Richards was only corroborative of the testimony admitted from the witnesses Edwards and Rosevear. If the testimony of the witnesses named did not amount to a contradiction of the evidence of the witness Forney

that all the steps of car No. 47923 were sound and not defective at 11 or 12 o'clock the night before—that the northwest step was particularly examined and found sound—there was in fact no such conflict as required a submission to the jury. On the other hand, if the jury should believe that the car examined by Edwards and Rosevear was the car examined by Forney, and the step found defective—the step nearest plaintiff when injured—there would be a contradiction unless the other circumstances would justify an assumption that the injury to the step described by the first-named witnesses had occurred after the accident and before those witnesses saw it. This, too, was a question for the jury. Upon the whole case, we think, there was something more than a bare scintilla of evidence tending to show that plaintiff's injury was caused by the defective step inspected by Edwards, Rosevear, and Richards.

Reverse, and remand for a new trial.

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DEFECTIVE SAFETY APPLIANCES.

NEW YORK, N. H. & H. R. CO. v. O'LEARY.

(Circuit court of appeals, first circuit. April 14, 1899.)

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1. TRIAL—OBJECTION TO EVIDENCE—STATEMENT OF GROUNDS.

The rule applied that all objections to the admission of evidence must be so specific as to give the other side full opportunity to obviate them at the time, if it can be done.

2. MASTER AND SERVANT—ACTION FOR PERSONAL INJURIES—INSTRUCTIONS.

In this action by a servant against the master to recover for personal injuries, as the request for an instruction as to contributory negligence was based on an incomplete statement of the facts in issue and bearing on the question, it was properly refused.

3. FEDERAL COURTS—RULES OF DECISION—FOLLOWING STATE DECISIONS.

The rule applied that questions arising under a common-law count for negligence in a declaration by a servant against the master for personal injuries are not governed in a Federal court by the decisions of the courts of the State, but are to be determined upon a consideration of all the authorities and of the principles underlying the general law of master and servant.

4. MASTER AND SERVANT—SAFETY OF APPLIANCES—CARE REQUIRED OF SERVANT.

Railway Co. v. *Archibald* (170 U. S., 665; 18 Sup. Ct., 777) applied, to the effect that an employee has a right to assume that the employer will use reasonable care to make appliances safe, and is not required to exercise ordinary care to ascertain their condition, but assumes the peril only from defects known to him or plainly observable by him.

5. SAME—RESPONSIBILITY OF MASTER FOR ACTS OF AGENTS.

The rule of *Railway Co.* v. *Barrett* (166 U. S., 617; 17 Sup. Ct., 707) applied, to the effect that, so far as relates to the safety of machinery and appliances furnished by a master for use by the servant, the neglect of the master's agent is his neglect.

6. REVIEW—HARMLESS ERROR.

It is settled that errors in the giving or refusal of instructions which, under the verdict rendered, could not have prejudiced the plaintiff in error are not ground for a reversal of the judgment.

7. MASTER AND SERVANT—ACTION BY SERVANT FOR INJURIES—REVIEW.

A declaration by a servant against a railroad company, to recover for personal injuries, contained three counts—the first two based on statutes of the State and the third a common-law count for negligence. The allegations of facts contained in each of the first two counts were sufficient, if established, to support a recovery under the third count. A general verdict for plaintiff was rendered, in an amount within that recoverable under either count. *Held*, that it was immaterial to defendant to which count the verdict was ascribed, or whether there was error in the giving or refusal of instructions relating to the statutory counts, as the facts necessarily found supported a judgment for plaintiff on the third count.

8. APPEAL—HARMLESS ERROR.

Where the whole case relating to any particular question is expressly stated as such on a writ of error, as in the case at bar, it will be held that exceptions taken at the trial before the jury with reference to any particular question, by the party against whom the verdict was rendered, will not avail that party if it is apparent that a verdict in his favor on that question would have been required by the rules of law to have been set aside by the court below.

In error to the circuit court of the United States for the district of Massachusetts.

Robert W. Nason and *Thomas W. Proctor* for plaintiff in error.
Edward H. Pierce for defendant in error.

Before COLT and PUTNAM, *Circuit Judges*, and WEBB, *District Judge*.

PUTNAM, *Circuit Judge*. The plaintiff below (now the defendant in error) was a brakeman on the freight trains of the plaintiff in error (defendant below). The accident occurred in December, 1897, on the Providence division on the main line of the railroad of the plaintiff in error, between two stations, each of which is within the limits of the city of Boston. It is a matter of common knowledge, of which the jury was entitled to avail itself, that on this portion of the line a very large amount of traffic is done, thus making reasonable diligence on the part of the plaintiff in error in caring for its roadbed and its appurtenances to include great promptness and vigilance. The cause of the accident was a guy supporting a derrick, which was stretched over the tracks of the plaintiff in error by one O'Connell, who was working outside the line of the railroad under a contract with the city of Boston, changing the location of Stony Brook. O'Connell had previously had a guy over the track, but on December 15, 1897, he moved his derrick and in that connection stretched another guy or moved the old one, the record on this point not being clear and it not being a matter of any importance for this case whether it was one or the other. O'Connell testified that he had obtained permission from the plaintiff in error, through its superintendent, to move the guy, or to run the additional one, whichever it was. His testimony as to this was not contradicted nor questioned. This is important, showing that O'Connell was not a trespasser in stretching the guy, and that the plaintiff in error knew in advance that it was to be stretched, and so had the opportunity of exercising proper vigilance and care to prevent it from being set so low as to endanger the operation of its railroad. The guy was stretched on the afternoon of December 16. There was evidence pro and [redacted] on the issue whether instructions had been given by the section foreman that the guy must be at least 22 feet above the track; but its height had not been measured, and the record does not show that the flagman who was left by the section foreman to watch the work was given any instrument with

which he could measure it. The plaintiff below testified that he came into Boston on a freight train that night on track 2, there being four tracks at that point, and that he did not observe the guy nor come in contact with it. He would not necessarily have done the latter unless he had been standing on a car, and the guy might have been higher over track 2 than over 3, where he was injured. The next morning his train ran out on track 3, and while he was standing on the top of a car, with his back to the head of the train, exchanging signals with the conductor, the guy struck him in the neck and caused the injury for which this suit was brought. There was no evidence nor presumption that he either saw the guy in its new position, or that he could have seen it unless he omitted attending to his duties as a brakeman exchanging signals.

There are three counts in the declaration. The third is the usual count at common law, charging negligence on the part of the plaintiff in error and alleging care on the part of the defendant in error. Each of the other counts closes with the allegation that it is based on chapter 270 of the Statutes of Massachusetts of 1887. The first refers to that part of the statute which relates to the condition of "ways, works, and machinery" of an employer, and the second to that part which relates to the negligence of a person in the service of a common employer, "intrusted with and exercising superintendence." The damages claimed under the third count were $20,000, and under each of the others $4,000, the maximum allowed by the statute. The verdict was a general one for $3,625. Each of the counts which refer to the statute alleges every fact necessary to hold the plaintiff in error liable under the common-law count; so that, as also the damages awarded were less than the statutory maximum, the condition of the plaintiff in error could not have been in any manner impaired by the fact that the jury, in determining its verdict, let it turn on the statutory counts rather than on the common-law count, or vice versa. This observation relates not only to the question of damages but to all the other matters involved in the suit.

There were sundry exceptions taken by the plaintiff in error to the rulings of the court on matters of evidence and a great many exceptions to its rulings and refusals to rule in connection with its charge. The bill of exceptions states that it contains all the evidence except that relating to the extent of the injuries to the defendant in error, which is not material to any exception taken. We are therefore in a condition to determine not merely how far any ruling or refusal to rule was theoretically correct but how far it affected the proper result of the suit.

During the course of the trial the court admitted, subject to exception by the plaintiff in error, evidence of the contents of a letter from the road master of the plaintiff in error, permitting the derrick to be moved and giving directions to the section foreman to send a

flagman to do the necessary flagging. This evidence was admitted after the witness, who was the section foreman, had been asked whether he could find the letter and had answered with an unqualified "no." The only objection found in the record is as follows: "The witness was asked by the plaintiff the contents of the letter. To this the defendant objected." It is impossible to tell from this whether the objection was to the subject-matter of the letter or to the admission of its contents without further evidence of its loss. The witness's positive answer that he could not find the letter was sufficient to justify the court in admitting proof of its contents in the absence of anything showing that either party desired to examine the witness further. But, independently of this, if the defendant below had intended to object on the ground that the original of the letter should be produced, it should have stated the grounds of the objection in order that the court or the other party might have been put on guard and have made further examination of the witness, if it was deemed proper, and thus possibly have entirely obviated all doubts. The rule has been laid down over and over again by the Supreme Court and in such explicit terms as ought to terminate all assignments of errors of this character. It applies wherever the evidence objected to could be admitted under any circumstances. A full statement of it will be found in *Nooman* v. *Mining Co.* (121 U. S., 393, 400; 7 Sup. Ct., 911), and a reference to the general principles underlying it is given in *Railroad Co.* v. *O'Reilly* (158 U. S., 334, 335; 15 Sup. Ct., 830). Its pith is that all objections in the course of a trial must be so specific as to give the other side full opportunity to obviate them at the time, if, under any circumstances, that can be done. The defendant below also objected, in the same general way, to a conversation between one Gaffney, who had charge of the work for O'Connell, and the section foreman, in which the latter forbade the work until a permit from the corporation's officials should be obtained. It would be sufficient to say also to this that this objection was in general terms. All the testimony of this class, however, including the letter, was wholly immaterial and could not in any way have prejudiced the defendant below. Its effect, and the only effect which any of it could have had, was to satisfy the jury that O'Connell was not a trespasser in stretching the guy, and that the defendant below consented to its being done and so had notice in advance thereof, as we have already said. This was proved by the testimony of O'Connell to which we have already referred, and therefore we have no occasion to consider further this line of exceptions.

The plaintiff in error requested the following instruction:

> If the plaintiff, knowing that work was going on beside the track with the derrick and that the guy was stretched across the track, which was likely to be moved, paid no attention to it at all, he can not be said to have been in the exercise of due care, and can not recover.

The defects appearing on the face of this are frequent in requested instructions, which, instead of merely stating a rule of law, attempt to set out in detail, hypothetically or otherwise, the facts in evidence. It gives only a portion of the elements of the case in any view of it, and on this partial statement it requests the court to take this issue from the jury. It forgets that the plaintiff below had a right to assume that if the guy was moved the defendant below would see to it that it was not left in a dangerous position, and also that there was no evidence that he paid no attention "at all," or that he had or would have had any opportunity to learn when the guy would be moved, or that he had, under the circumstances, any opportunity to pay any attention to the matter of its changed position. The court properly instructed the jury that it might consider the fact that this work was going on as an element, in passing on the degree of care used by the plaintiff below, which on the proofs was all that the court was required to do so far as concerns the subject-matter of this request. To have gone further, as the defendant below requested, would have been to have taken from the jury the issue of the plaintiff's care on an incomplete statement of facts.

So far as the statute applies to the first and second counts of the declaration, the plaintiff in error is correct in maintaining that the questions are local and are ordinarily to be determined by the decisions of the State courts. But so far as concerns the relations to this case of the common law in *Railroad Co.* v. *Baugh* (149 U. S., 370; 13 Sup. Ct., 914), as well as elsewhere, the Supreme Court holds that questions of this character are to be determined by a reference to all the authorities, and a consideration of the principles underlying the relations of master and servant. In *Railway Co.* v. *Archibald* (170 U. S., 665; 18 Sup. Ct., 777), the court, at pages 671 and 672, 170 U. S., and pages 779 and 780, 18 Sup. Ct., observed that an employee has a right to assume that the employer will use reasonable care to make appliances safe, and has a right to deal with those furnished, relying on that assumption. The court also upheld the court below in striking from a requested instruction expressions charging on the employee, in this particular, the necessity of the exercise of ordinary care in ascertaining the condition of his employer's appliances, and left resting on him the peril only of defects "known to him or plainly observable by him." This decision emphasizes the insufficiency of the requested instruction.

The plaintiff in error has treated the case, so far as it depends on the common law, as a question of the relations of common employees to each other. It presents no such issue. The law on this topic is epitomized in *Railroad Co.* v. *Baugh* (*ubi supra*) and *Railway Co.* v. *Barrett* (166 U. S., 617, 619; 17 Sup. Ct., 707) rules on the precise point here. There it is said that, so far as the safety of machinery and appliances for the use of employees is concerned, the neglect of

the agent of the principal is his neglect. On this rule, a large portion of the requested instructions of the plaintiff in error drops out.

The plaintiff in error contends that the guy complained of was not within the statute, so far as it relates to "ways, works, or machinery," and that, also, there was not sufficient evidence for the jury of any negligence of any person intrusted with superintendence within the statutory meaning. Evidently the learned judge who tried the case in the court below felt difficulties in resting it on either the first or second count, and apparently he did not consider it of importance whether or not they were taken into consideration. He observed that "the case stated in three ways in the declaration may well apply to the facts;" and also he said that whether or not the guy was a defect, within the statute, it was such a defect at common law as would hold an employer liable under the circumstances detailed by him. Therefore it seems to us that, on the evidence in the record, the court did not deem it necessary to distinguish between the several counts. Only one verdict was rendered, and, as we have already said, the plaintiff in error could suffer no detriment by its being assigned to either of the counts. The plaintiff in error nevertheless has assigned a number of errors based upon requests to the court to take the first and second counts from the jury. Under the circumstances which we have explained, the refusal of these requests could not have prejudiced it, and therefore the exceptions based thereon are immaterial and could not require us to set aside the verdict. (*Decatur Bank* v. *St. Louis Bank*, 21 Wall., 294, 301; *Sullivan* v. *Mining Co.*, 143 U. S., 431, 434, 12 Sup. Ct., 555.) Indeed, the case comes, in this particular, within the strict rule of the Supreme Court, inasmuch as it appears beyond doubt that these alleged errors could not have prejudiced the plaintiff in error. (*Railroad Co.* v. *O'Reilly* (already cited), 158 U. S., 334, 337; 15 Sup. Ct., 830.) In *Sullivan* v. *Mining Co.*, at page 434, 143 U. S., and page 556, 12 Sup. Ct., the Supreme Court uses the following expressions: "Upon all the facts in the case, the judgment was one which must necessarily have been rendered." In the case at bar the "facts" were those found by the jury. To whichever count it assigned its verdict, it must, as we have already said, have found all the facts alleged in the third count, and therefore, in any event, sufficient to support the verdict. It therefore becomes unimportant whether or not the court was in error on the question whether the guy concerned "ways, works, or machinery," or in regard to the alleged negligence of a person charged with superintendence in the statutory sense. In any view of the case, facts enough being found to sustain the verdict on the third count, the judgment must stand.

We can go further. On the whole case there is, as we have already said, the uncontrovertible presumption that the defendant below, in operating this part of its line, was bound to great vigilance and care.

There is undoubted evidence that it knew that the guy was to be stretched over the track; that it had ample opportunity to provide in advance that it should be set at a proper height; that omission to accomplish this was negligence toward the plaintiff below; that there was no evidence, within the expressions of *Railway Co.* v. *Archibald*, already cited, that he knew of the defect, or that it was plainly observable by him; and the circumstances of the case show that, performing his duties as he was required to perform them, he could not easily have known it. So that, on the whole case, if the verdict had been for the defendant below, the court below would have been required, as the rule is now practically applied, to have set it aside. On the whole, on the uncontrovertible facts of the case, a verdict and judgment for the plaintiff below were the only verdict and judgment which could properly have been rendered; and therefore the rule applies which is stated in *Decatur Bank* v. *St. Louis Bank*, already referred to, at page 301, that, to warrant the reversal of a judgment, there must not only be error, but the error must be such as to have worked injury to the party complaining.

All the other alleged errors are covered by what we have already said, or are so clearly not errors as not to require any expression of our views about them. The judgment of the circuit court is affirmed, with interest, and the defendant in error recovers his costs in this court.

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DEFECTIVE SAFETY APPLIANCES.

SAMUEL H. TROXLER v. SOUTHERN RAILWAY COMPANY, APPELLANT.

(124 N. C., 191; 32 S. E., 550; 44 L. R. A., 313.)

1. Continuing negligence of an employer, such as the failure to furnish safe appliances in general use, which would have prevented the possibility of injury, precludes the defense of contributory negligence.
2. Failure to furnish proper and safe appliances whereby a servant is injured can not be attributed to the negligence of a fellow-servant.
3. Failure to furnish automatic car couplers in common use for freight cars is negligence *per se*, which renders a railroad company liable to an employee for njuries received in attempting to couple cars having skeleton drawheads of unequal height.

(March 21, 1899.)

Appeal by defendant from a judgment of the superior court for Guilford County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Mr. *F. H. Busbee* for appellant.

The opinion of the court in the case of *Greenlee* v. *Southern R. Co.* (122 N. C., 982; 41 L. R. A., 399) falls into what it is respectfully submitted is the cardinal error of treating the date of the rendition of the opinion in May, 1898, as the time of the accident, which was some years previous.

In the case at bar the injury occurred on February 2, 1895.

The opinion in *Mason's case* (111 N. C., 490; 18 L. R. A., 845) was delivered about December, 1892, scarcely more than two years prior to the accident. In the report of the Interstate Commission of December 1, 1895, published nearly a year after the Troxler injury, it is stated, on page 52, that "74.80 per cent of the total equipment is still without train brakes and 72.70 per cent without automatic couplers."

At that time the Federal law required interstate equipment to be supplied with these safety appliances by January 1, 1898, and this time was afterwards extended to January 1, 1900.

To render the opinion of the court in the Greenlee case applicable to the case at bar, the court must now hold that two years after the indefinite warning by the court in Mason's case, and five years before the national authority required the general use of these safety appliances, a decision can be based upon the warning in the Mason case, and make a failure to use automatic couplers absolute negligence two years after Mason's case, upon the allegation that there was a six years' notice. This seems in all respects to be ex post facto.

Messrs. *Schenck & Schenck* and *Charles M. Stedman*, for appellee.

There was an implied obligation resting on the defendant company that it should provide suitable and safe cars and appliances to enable plaintiff to do his work as safely as the hazards incident to the employment would permit.

Bailey, Master's Liability for Injuries to Servants, pages 2, 3, note 1 on page 2, note 3 on page 3; *Mason* v. *Richmond & D. R. Co.*, 111 N. C., 490, 18 L. R. A., 845; *Conley* v. *Richmond & D. R. Co.*, 84 N. C., 309, 37 Am. Rep., 620; *Johnson* v. *Richmond & D. R. Co.*, 81 N. C., 453; *Gottlieb* v. *New York, L. E. & W. R. Co.*, 100 N. Y., 467; *King* v. *Ohio & M. R. Co.*, 14 Fed. Rep., 277; *Hough* v. *Texas & P. R. Co.*, 100 U. S., 218, 25 L. ed., 615; *Northern P. R. Co.* v. *Herbert*, 116 U. S., 642, 29 L. ed., 755; *Chicago, M. & St. P. R. Co.* v. *Ross*, 112 U. S., 384, 28 L. ed., 790; *Union P. R. Co.* v. *Daniels*, 152 U. S., 689, 38 L. ed., 601; *Baltimore & O. R. Co.* v. *Baugh*, 149 U. S., 386, 37 L. ed., 772; *Pennsylvania Co.* v. *Whitcomb*, 111 Ind., 212; *Witsell* v. *West Asheville & S. S. R. Co.*, 120 N. C., 557.

The defendant company owed a duty to plaintiff to exercise reasonable care in supplying for the operation and control of the train a sufficient number of competent servants, and for a failure of duty in this respect it is responsible in damages to the plaintiff if he was injured in consequence thereof. The contract was that he should not be exposed to any increased risk by reason of a lack of adequate help.

Bailey, Master's Liability for Injuries to Servants, 68, 69; *Northern P. R. Co.* v. *Herbert*, 116 U. S., 647, 29 L. ed., 758; *Flike* v. *Boston & A. R. Co.*, 53 N. Y., 550, 13 Am. Rep., 545; *Booth* v. *Boston & A. R. Co.*, 73 N. Y., 38, 29 Am. Rep., 97; *Mad River & L. E. R. Co.* v. *Barber*, 5 Ohio St., 541, 67 Am. Dec., 312.

These duties can not be delegated to another.

Bailey, Master's Liability for Injuries to Servants, 131–133; *Trawler* v. *Southern R. Co.*, 122 N. C., 902; *Northern P. R. Co.* v. *Herbert*, 116 U. S., 642, 647, 29 L. ed., 755, 758; *Hough* v. *Texas & P. R. Co.*, 100 U. S., 218, 25 L. ed., 615; *Union P. R. Co.* v. *Daniels*, 152 U. S., 689, 38 L. ed., 600; *Laning* v. *New York C. R. Co.*, 49 N. Y., 521, 10 Am. Rep., 417; *Pennsylvania Co.* v. *Whitcomb*, 111 Ind., 212; *Greenlee* v. *Southern R. Co.*, 122 N. C., 977, 41 L. R. A., 399.

The conductor in charge of the train was not a fellow-servant of the

plaintiff, but was a vice-principal of defendant company, and if the injury to plaintiff was caused by the negligent management of said conductor in operating and controlling the train while the coupling was being made, the defendant is liable therefor.

Mason v. *Richmond and D. R. Co.*, 111 N. C., 482; 18 L. R. A., 845; *Purcell* v. *Southern R. Co.*, 119 N. C., 728.

If the neglect by which the accident and injury to plaintiff was brought about was a continuous one, it will be regarded as the proximate cause, and defendant would be liable.

Lloyd v. *Albemarle and R. R. Co.*, 118 N. C., 1010; *Mayes* v. *Southern R. Co.*, 119 N. C., 758; *Mosie* v. *Atlantic and N. C. R. Co.*, 120 N. C., 491; *Stanley* v. *Durham and N. R. Co.*, 120 N. C., 516.

CLARK, J., delivered the opinion of the court.

The plaintiff was injured in attempting to couple cars of the defendant on which there were no automatic car couplers, but in lieu thereof skeleton drawheads of unequal height. The court below held that the absence of automatic couplers, in general use, was negligence *per se*, and refused to submit an issue whether the injury was not caused by the negligence of a fellow-servant, and refused to instruct the jury, as prayed, that the plaintiff was guilty of contributory negligence if he could, by proper care, have coupled the cars by hand without accident.

The duty to furnish proper and safe appliances is that of the common master, and injury caused by their absence can not be attributed to the negligence of a fellow-servant. (*Troxler* v. *Southern R. Co.*, 122 N. C., 902; *Wright* v. *Southern R. Co.*, 122 N. C., 959.) It has been heretofore held in *Greenlee* v. *Southern R. Co.* (122 N. C., 977; 41 L. R. A., 389) that failure of a railroad company to equip its freight cars with modern self-coupling devices is negligence *per se* continuing up to the time of an injury sustained by an employee in coupling cars by hand, and renders the company liable, whether such employee was negligent in the manner of making the coupling or not. The same ruling had been previously made as to the duty of furnishing automatic car couplers on passenger trains in *Mason* v. *Richmond and D. R. Co.* (1892). (111 N. C., 482; 18 L. R. A., 845.) Where the negligence of the defendant is a continuing negligence (as the failure to furnish safe appliances, in general use, when the use of such appliances would have prevented the possibility of the injury), there can be no contributory negligence which will discharge the master's liability. This has been repeatedly and uniformly held. (*Norton's case*, 122 N. C., 911; *McLamb's case*, 122, N. C., 873; *Cone* v. *Delaware, L. and W. R. Co.*, 81 N. Y., 206, 37 Am. Rep., 491.) The failure to provide the necessary appliances is the *causa causans*. The defendant, however, frankly asks us to reconsider and overrule Greenlee's

case. That case was the expression of no new doctrine, but the affirmation of one as old as the law, and founded on the soundest principles of justice and reason, to wit: That when safer appliances have been invented, tested, and have come into general use it is negligence *per se* for the master to expose his servant to the hazard of life or limb from antiquated and defective appliances which have been generally discarded by the intelligence and humanity of other employers. (*Witsell* v. *West Asheville and S. S. R. Co.*, 120 N. C., 557.) This must be so if masters owe any duties to their employees, and unless economy of expenditures on the part of the railroad management is to be deemed superior to the conservation of the lives and limbs of those employed in their operation. In the twelfth annual report of the Interstate Commerce Commission (1898), published by authority of the United States Government, upon returns made by the railroad companies themselves, it is stated (at page 88): "Since the enactment of the law, in 1893 (requiring automatic couplers), there has been a decreasing number of casualties. There were 1,034 fewer employees killed and 4,062 fewer injured during the year ending June 30, 1897, than during the same period in 1893. The importance of this subject will be realized when the yearly casualties to railway employees are compared with those which occurred during the recent war. In the Spanish-American war there were 298 killed and 1,645 wounded. In 1897 there were 1,693 men killed and 27,667 injured, from all causes, in railway service. From coupling and uncoupling cars alone 219 less were killed and 4,994 less were injured in 1897 than in 1893, when the law was enacted. The number of such employees killed has been reduced one-half, and the number of injured also practically reduced one-half. The reduction in the number of accidents from all causes largely exceeded (by nearly 3 to 1), in a single year, the entire casualties resulting from the prosecution of the late war." Thus, in four years, from 1893 to 1897, notwithstanding the increase of thousands of miles of railways and over 100,000 of employees, and the further fact that the railroad corporations have been able to procure from the Interstate Commerce Commission an extension of the time at which the law of Congress imposing a penalty for operating any cars without self-couplers will come into force, the shadow of the law has procured so general an attachment of these self-couplers that 5,213 fewer employees were killed and wounded in coupling and uncoupling cars in 1897 than in 1893. Can it therefore be seriously contended that the absence of such safety appliances is not a negligence *per se*, rendering the railroad company liable for damages? As these appliances have been patented and more or less in use for over thirty years, it should not have required an act of Congress to enforce their universal adoption. Failure to adopt them, after being so long and widely known and used, was negligence in the defendant upon the principles of the

common law. (*Witsell's Case*, 120 N. C., 557.) The act of Congress imposing a penalty for failure to add the appliances after January 1, 1898, in no wise affected the right of any employee to recover for damages sustained by the negligence of any railroad company to attach them. The action of the Interstate Commerce Commission in extending the date at which such act should come into force (by virtue of authority given in the act) could not set aside the principle of law that failure to adopt such appliances was negligence *per se*, nor have any other effect than to postpone the date at which the United States Government would impose the prescribed penalty upon all railroads engaged in interstate commerce failing to equip all their cars with automatic couplers—a penalty which is imposed irrespective of whether any accidents occur from such failure or not. The indifference of railroad companies shown in not adopting these life and limb saving appliances is all the greater since their cost is comparatively small. Indeed, the Interstate Commerce Commission, in the above-cited report (p. 89), state that, considering the less expense required in repairs, they are an actual saving. They say: "Figures submitted by one of the leading railroad companies indicate that the adoption of the automatic coupler will result in saving a very large sum annually, in comparison with the expense incurred in former years in applying and maintaining the link and pin type; and this does not take into account the reduced cost to the roads which must result from fewer suits for damages by injured employees." And, further, that there being too much slack in the old pin and link for the brake to act economically or successfully, the automatic coupler "makes the requirements of railroad operation better, as well as minimizes the danger to employees." In *Witsell* v. *West Asheville & S. S. R. Co.* (120 N. C., 557, 562), it is said: "If any appliance is such that the railroads should have it, the poverty of the company is no sufficient excuse for not having it." But not only, as above the use of self-couplers would be an actual economy to the defendant, but that it is amply able to put on these appliances, if it was not, is shown by the published report of the defendant company that its gross earnings for the year 1895 (when this injury was inflicted) were over $17,000,000, and its net earnings over and above all expenses were more than $5,000,000 (Poor R. R. Manual, 1898, p. 792)—figures which, for the year just past, have risen to over $20,000,000 gross earnings and over $6,000,000 net earnings. With such an array as above of the terrible cost of life and limb by failure to use appliances to avoid coupling and uncoupling cars by hand (in doing which the plaintiff was injured), the small expense—nay, actual economy—of adopting them, and the ample means the defendant possesses, we can not reverse our ruling in Greenlee's case, that it is negligence *per se* in any railroad company to cause one of its employees to risk his life or limb in making couplings which can be made automatically without risk.

This matter of requiring these great corporations to protect the traveling public, and their employees as well, by the adoption of all safety appliances which have come into general use, is so important that we have gone into the subject at this length. Ordinarily owned by great syndicates out of the State in which they operate, and their management, at all events, removed from any subjection to that sound public opinion which is so great a check upon the conduct of individuals and of government itself, the sole protection left to the traveler and the employee alike is the application of that law which is administered impartially and which can lay its hand fearlessly upon the most powerful combination and protect with its care the humblest individual in the land. The subject is one of transcendent importance, for, notwithstanding the partial adoption of these appliances and consequent reduction in casualties, the Twelfth Annual Report of the Interstate Commerce Commission shows (p. 77) that for the year ending June 30, 1897, on the railroads engaged in interstate commerce (which alone report to that Commission) there were still 43,168 casualties, of which 6,437 resulted in death. Of these, 1,693 killed and 27,667 wounded were railroad employees, among whom 214 were killed and 6,283 wounded in coupling or uncoupling cars. In our own State the report of the North Carolina Railroad Commission for 1898 (pp. 250, 251) shows that for the year ending June 30, 1898, the railroads reported 879 persons killed and wounded (of whom 99 were killed), and of these 23 of the killed and 599 of the wounded were employees; total, 622. As, of the 9,000 employees reported in this State, 4,000 (according to the usual ratio) were employees engaged in the actual operation of the trains, it follows that in this State 1 such employee in every 6½ was in that year injured or killed. In view of such mortality, rivaling that of the bloodiest wars, this court can not reverse its declaration heretofore, which is sustained by every sentiment of justice and humanity, that where a life and limb saving appliance, like automatic car couplers, has come into general use and its partial adoption has in four years, notwithstanding the increase in railroad mileage and employees, decreased the injuries and deaths from coupling cars one half, the failure to adopt and use it is negligence *per se*. Considering the economy in money of using such appliances, as well as the ample revenues of the defendant, it is passing strange that it or any other railroad company should have delayed till now, or even till 1895, to protect the lives and limbs of their employees in this particular, or that there should have been need of an act of Congress or the verdict of a jury to stimulate considerations of humanity toward their patrons and their employees. Counsel for the defendant read, as part of his argument, a clipping from a newspaper, and repeats in his brief that a noble English lord, who was a railroad manager as well as an hereditary member of Parliament, had changed his party affiliations because

the one to which he had belonged had advocated the enforced adoption of self-couplers upon English railways. That simply shows that one such manager, at least, possesses a lordly disregard for the thousands of deaths and injuries of employees yearly caused by the lack of safety appliances; and it may be there are others who entertain sentiments of higher allegiance to the net earnings of the syndicates that employ them than to those great principles which every political party professes to advocate as being for the best interests of the public. But the hostility of one or more railway managers toward the matter can not affect the impartial enforcement of the sound legal principle that employees and the traveling public alike have a right to be protected against any dangers which can be avoided by the adoption of safety appliances which have been tested by experience and which have come into general use. In the present case the defendant has the less excuse, because there was uncontradicted testimony, not only that automatic car couplers were in general use at the time of the injury (March, 1895), but that the skeleton drawheads, in attempting to make a coupling with which the plaintiff was injured, were defective in that they were of different heights from the ground, and evidence that the cars could not have been coupled with a stick, or in any other manner except by hand.

No error.

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DEFECTIVE SAFETY APPLIANCES.

DECISION OF UNITED STATES CIRCUIT COURT OF APPEALS.

NORTHERN PACIFIC RAILWAY COMPANY v. TYNAN.

(Circuit court of appeals, ninth circuit. October 6, 1902. No. 790.)

[Reprinted from the Federal Reporter, vol. 119, p. 288, by permission of the West Publishing Company.]

1. MASTER AND SERVANT—DEFECTIVE RAILROAD CARS—ASSUMED RISK.

It is the duty of a railroad company, which it owes to its employees as well as to the public, to use reasonable care to see that the cars used on its road are in good order and fit for the purposes for which they are intended; and an employee has the right to rely upon the performance of this duty, and does not assume the risk arising from the company's neglect to perform it.

2. SAME—CONTRIBUTORY NEGLIGENCE—COUPLING CARS.

The burden of proving contributory negligence of an employee, to defeat recovery for his injury, rests on the master; and it must be shown not only that he was negligent, but that his negligence caused or contributed to the injury. The fact that a brakeman, killed while attempting to couple cars on a side track which was on a curve, was working from the inside of the curve does not warrant an instruction that he was guilty of negligence, as a matter of law—much less that he was guilty of contributory negligence—where there was evidence that with the cars to be coupled there was as little danger on the inside as on the outside.

3. SAME—ACTION FOR DEATH OF BRAKEMAN—QUESTION FOR JURY.

Plaintiff's intestate, while employed as a brakeman by defendant railroad company, was killed while attempting to couple two cars on a side track. One of the cars was equipped with an old-style Miller hook coupler. It was little used, and when used, was coupled to cars having link and pin couplers; but it was not blocked to hold the hook in position, as customary when such cars are so used, and was old and not in good repair. The other car had also an old-style skeleton link and pin coupler, not generally in use, and the coupling between the two was more than usually dangerous. Deceased was not instructed as to the kind of couplers, and, so far as appeared, did not know the kind in use on such cars. *Held*, that defendant was negligent in the use of such appliances, and that, in the absence of conclusive proof of contributory negligence, the court properly refused to direct a verdict for defendant.

4. APPEAL—REVIEW—REFUSAL OF INSTRUCTION.

A judgment will not be reversed on appeal because of the refusal of instructions requested, where the record does not contain the entire charge given.

In error to the circuit court of the United States for the district of Oregon.

To clearly understand the contentions of the respective parties, and the opinion of the court, it is essential to outline the substance of the testimony given at the trial. The testimony shows that the deceased went to work for the railway com-

pany as brakeman on its Burke-Wallace branch about three weeks prior to his death; that he was a competent, skillful brakeman; that the train crew consisted of Chattin, as conductor, the deceased, and Chester, as brakeman; that on the morning of March 13, 1899, deceased and Chester were, pursuant to Chattin's orders, engaged in the Wallace yards in making up the train that was to leave for Burke; that Chattin told them to get a certain box car off of a yard track called the "Nine-mile track," and put it in the train behind coach 417, which was the passenger coach regularly used on that run; that in front of said box car on the nine-mile track was coach 645; another coach was standing on the adjoining house track; to get said box car in its proper place in the train, deceased and Chester had to first move the coach on the house track, to throw the switch, and get in over the frog to the nine-mile track, and then couple onto and move coach 645; that deceased and Chester were doing the coupling and switching and braking required in the making up of the train; that Chattin did not get over to where they had been working until after the deceased was injured, and just as he died; that deceased and Chester were proceeding in the right way to get said box car, when, in the act of coupling coach 417 onto coach 645, for the purpose of moving the latter and getting at the box car, deceased was injured;

That immediately before and at the time of the injury Chester was on top of the box car for the purpose of letting off the brake thereon, and said brake was not to be let off, nor Chester leave the top of the box car, until deceased had coupled 417 to 645, and also coupled the other end of 645 to the box car, and then Chester was to release the brakes on the box car; that the coupler on the end of 417 was a skeleton drawbar, made of malleable iron, and riveted together; this skeleton drawbar was an old-style link and pin coupler, the first one that was ever gotten out, and was unhandy and dangerous, and in making a coupling between it and any other coupler a link and two pins would have to be used; that this skeleton drawbar on 417 was different from and more dangerous and inconvenient to use than the ordinary style of skeleton drawbars; that 645 was an extra coach, not used regularly; that it was equipped with Miller hooks on both ends; that it was the only car used on the Burke branch that was equipped with Miller hooks; that the Miller hook was an old-style coupler, designed and intended for passenger coaches, to be used automatically with another Miller hook, and at the time of the injury was not in general use; that more modern automatic couplers had been in general and successful use on both passenger coaches and on freight cars for some time before the deceased was injured.

That the head of the Miller hook is hook-shaped; that the coupler has a long shank, which sets, and has considerable play and lateral motion in a carrying iron; that this play and motion allow the sloping sides of the heads, as two Miller hooks come together, to slip by each other until the hooks pass, when, by the action of a large heavy spring back of the carrying iron, the hooks are forced and grip together, and thus an automatic coupling is effected; that a Miller hook will only couple automatically with another Miller hook; that to couple it to anything else a link and pin must be used; that a coupling between a Miller hook and a skeleton drawbar is the most dangerous and difficult coupling known to trainmen; that a coupling could be much more easily effected between a Miller hook and skeleton drawbar of the ordinary style than between the particular Miller hook and the particular skeleton drawbar that were actually used on coaches 645 and 417; that the employees on the Wallace-Burke branch had, prior to the employment of deceased, complained to the railway officers of the danger of making couplings between Miller hooks and skeleton drawbars, and had requested the removal of the objectionable equipment; that the lateral motion of the Miller hooks could be prevented by putting blocks and wedges in the carrying iron or stirrup that holds the Miller hook; that when thus blocked the space where the Miller hook would otherwise move from side to side in the carrying iron is filled in with the block that is strapped or bolted there, which prevents the Miller hook from shoving over; that it was customary and usual to

block Miller hooks when they were habitually used in making link and pin couplings; that the Miller hook on 645 was not blocked in any way, and was used in nothing but link and pin coupling; that in the ordinary performance of the duty of coupling cars a brakeman could not observe whether or not a Miller hook was blocked.

That, owing to the infrequent use of 645, the train crew were seldom called on to make a coupling between a Miller hook and skeleton drawbar, and deceased had not attempted, so far as known, to make such a coupling during his employment by the railway company; that deceased was never warned by defendant, or any of its officers or employees, of the danger of making a coupling between a Miller hook and skeleton drawbar; that the proper and the safest way to make the coupling between the Miller hook on 645 and skeleton drawbar on 417 was to first put the link in the skeleton drawbar (417 being the moving car) and then guide such link by hand into the Miller hook on 645; that deceased had endeavored to make the coupling in that way; that an examination made immediately after the injury disclosed the fact that the ends or heads of the two couplers had slipped by each other so that the Miller hook was slipped in behind the lip of the skeleton drawbar, thereby allowing the platforms of the two coaches to come much closer together than they should come; that attached to the platforms of 417 and 645 were iron buffer plates, with springs attached to the back thereof, the object and purpose of which was to take up the slack and prevent the cars coming together with a jar; that the buffers were not designed or intended to keep the couplers far enough apart to prevent a man who was coupling them together from being squeezed to death; that there were no bumpers or deadwood or anything else on said coaches which would prevent such a result, or which would, in the event of the couplers passing each other, keep the platforms farther apart than the thickness of those bumpers—about 3 inches; that the coaches were on a curve at the time of the injury; that deceased was making the coupling from the inside of the curve; that an ordinary link and pin coupling can be made as easily and safely on a curve as on a tangent; that cars on a curve are ordinarily and generally coupled from the inside of the curve, because ordinarily the trainmen can not from the outside and can from the inside see and give signals to the engine; that the coupling between 417 and 645, which deceased was making, could be as safely made from the inside as from the outside of the curve; that deceased was compelled to make the particular coupling from the inside of the curve because he could not signal the engineer from the outside of the curve for two reasons, namely, (1) the cars and train which they were making up stood in the way, and (2) cars on the house track, which was next to the 9-mile track on the outer side of the curve, stood so close to the 9-mile track at the place of coupling that the deceased could not get far enough away from such outer side; that it was not practicable to make a coupling between the Miller hook and skeleton drawbar with a stick or knife or coupling pin; that the railway company's rule that requires couplings to be so made was universally disregarded, and no attempt was ever made by the railway company to enforce it.

B. S. Grossecup and *Jas. F. McElroy*, for plaintiff in error.

Arthur C. Spencer, *Dan. J. Malarkey*, and *Carey & Mays*, for defendant in error.

Before GILBERT and ROSS, *Circuit Judges*, and HAWLEY, *District Judge*.

HAWLEY, *District Judge*, after making the foregoing statement, delivered the opinion of the court:

This action was brought by the administrator of the estate of John Tynan, deceased, under the provisions of the Revised Statutes of

Idaho of 1887 (section 4100), to recover damages for the death of John Tynan, which occurred while he was employed as a brakeman by the railway company and engaged in attempting to couple two of its cars. The coupler on one of the cars was a Miller hook, and the coupler on the other was a skeleton drawbar. It is alleged in the amended complaint that both couplers were old and not adapted to each other or fit for use; that they were faulty in construction, out of repair, and did not couple automatically by impact; that there were no bumpers or deadwoods or other contrivance on the end of the cars to prevent the platforms on each car coming together in case the couplers passed each other in attempting to effect a coupling; that the Miller hook was not blocked, adjusted, or fixed so as to prevent or reduce the lateral motion thereof in an attempt to couple it with a skeleton drawbar; that the railway company failed to warn the deceased of the faulty condition and character of the coupler and of the danger that would accompany the act of making the coupling. The answer denies these allegations of the complaint and, for affirmative defense, alleges that when the deceased applied to it for employment he was furnished with a book of rules for the guidance of its employees, and that rule 25 provided that, before making a coupling, employees should take time to examine and ascertain the style and condition of the coupling to be made, and notified them that couplings can not be uniform in style, size, or strength; that the deceased at the time of his employment represented that he had nine years' experience in the railroad service, and promised that he would comply with the rules and regulations of the company and would discharge the duties of his employment and assume the risks thereof; that the deceased was guilty of neglect in making the coupling from the inside instead of the outside of the curve; that the deceased was guilty of negligence in making the coupling by placing the link in the skeleton drawbar instead of in the Miller hook; that the cars were used solely upon the Burke Branch, within the State of Idaho, and were not used in interstate commerce. Upon these issues the cause was tried before a jury, resulting in a verdict and judgment in favor of the defendant in error.

The principal error assigned is that the court erred in refusing to give the following instruction:

> I instruct you, gentlemen of the jury, that it will be your duty, under the evidence in this case and the law governing the same, to return a verdict for the defendant, and I hereby so direct you to do.

A careful reading of the entire testimony contained in the record, a portion of which is embodied in the foregoing statement of facts, has convinced us that the court did not err in refusing to give this instruction.

On March 2, 1893, Congress passed "An act to promote the safety of employees and travelers upon railroads by compelling common car-

riers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes." (27 Stat., 531; U. S. Comp. St. 1901, p. 3174.) This act has no special bearing on this case, except in so far as it suggests the reasons that led to its adoption. It is wholly immaterial whether the railway company was or was not engaged in the use of the cars in question in the business of interstate commerce, and we shall not discuss that question. Prior to the passage of this act there had been numerous decisions rendered by the courts of this country wherein it was held that the railroad companies were guilty of negligence in using the Miller coupler in connection with the ordinary link-and-pin drawbars. (*Russell* v. *Railway Co.*, 32 Minn., 230, 233, 20 N. W., 147; *Hungerford* v. *Railway Co.*, 41 Minn., 444, 43 N. W., 324; *Railway Co.* v. *Garrett*, 73 Tex., 262, 13 S. W., 62, 15 Am. St. Rep., 781; *Martin* v. *Railway Co.*, 94 Cal., 326, 329, 29 Pac., 645; *Southern Pac. Co.* v. *Burke*, 9 C. C. A., 229, 60 Fed., 704; *Smith* v. *Railway Co.*, 72 Hun, 545, 25 N. Y. Supp., 638.) These cases are all directly in point in favor of the ruling of the court below. But the present case is much stronger in its facts than in any of the cases cited, in this, that in the present case it is shown that there was no blocking and that the couplings on each of the cars were old and particularly dangerous, even of their kind. The facts in the case of *Railway Co.* v. *Archibald* (170 U. S., 665, 666; 18 Sup. Ct., 777; 42 L. Ed., 1188) closely resemble the facts in this case. It was there held that it is the duty of a railroad company to use reasonable care to see that the cars employed on its road, both those which it owns and those which it receives from other roads, are in good order and fit for the purposes for which they are intended, and this duty it owes to its employees as well as to the public; that an employee of a railroad company has a right to rely upon this duty being performed, and, while in entering the employment he assumes the ordinary risks incident to the business, he does not assume the risk arising from his employer's neglect to perform the duties owing to him with respect to the appliances furnished.

In the light of the testimony and of these decisions (many others might be cited to the same effect), the contention of the plaintiff in error that it had used ordinary and reasonable care in procuring and using proper and safe appliances for the coupling of its cars, and that its employee John Tynan, deceased, had assumed all the risks and was himself guilty of contributory negligence, does not specially commend itself to the favorable consideration of this court. *Kohn* v. *McNulta* (147 U. S., 238, 13 Sup. Ct., 298, 37 L. Ed., 150) and *Southern Pac. Co.* v. *Seley* (152 U. S., 145, 154, 14 Sup. Ct., 530, 38 L. Ed., 391), upon which the plaintiff in error relies, are readily distinguishable in their facts from the case at bar. The party injured had in the one case seen and coupled the cars there used, and in the other well knew of the danger-

ous appliances, without complaining of their use. In neither case was it pretended that the appliances were out of repair or in a defective condition, old, or unfit for use. Every case depends upon its own peculiar facts. The burden of proving contributory negligence on the part of the employee is always cast upon the railroad company, and the general rule is that it must not only appear that the employee was negligent, but it must also be shown that his negligence contributed to the injury. (*Coasting Co.* v. *Tolson*, 139 U. S., 551, 557, 11 Sup. Ct., 653, 35 L. Ed., 270, and authorities there cited; *Railway Co.* v. *Volk*, 151 U. S., 73, 77, 14 Sup. Ct., 239, 38 L. Ed., 78.)

Considerable stress is laid by the plaintiff in error upon the fact that the deceased was negligent in attempting to make the coupling from the inside of the curve. It is always easy to say that the injury which occurred might not have happened if the injured party had been on the other side or had used other methods in trying to make the coupling. But the question to be determined is whether or not he was guilty of negligence in attempting to make the coupling at the place, in the manner, and under the circumstances shown by the testimony. There was testimony in this case tending to show that the coupling could have been made while the cars were on the curve with as little danger on the inside as on the outside. The reason why it was attempted on the inside is shown by the existence of obstructions which prevented the deceased from signaling the engineer on that side when the coupling was made, which was a part of his duty. In *Bucklew* v. *Railway Co.* (64 Iowa, 603, 609, 21 N. W., 103) the court said:

> The engineer occupies one side of the locomotive and the fireman the other. The usual position of an employee desiring to make a signal for the purpose of controlling the movements of a train, when not on a curve, is on the engineer's side. In the present case the plaintiff was on the fireman's side when he gave the signal to stop the train. It is claimed the plaintiff can not recover because he was not in his proper place. But there was evidence tending to show that, immediately prior to the time the signal was given, the train passed over a curve in the track, and that a signal given while the train was so passing from the engineer's side could not have been seen by him. Now conceding that the train had passed a short distance beyond the curve, we can not say that the plaintiff was negligent in not more promptly passing to the other side of the train before giving the signal.

But in any event the question of contributory negligence under the testimony, including rule 25 of the railway company, was one of fact for the jury to determine. The law is well settled that no case should ever be withdrawn from the jury unless the conclusion necessarily follows, as a matter of law, that no recovery could be had upon any view which can properly be taken of the facts which the evidence tends to establish. (*Railroad Co.* v. *McDade*, 135 U. S., 554, 571, 10 Sup. Ct., 1044, 34 L. Ed., 235; *Railway Co.* v. *Ives*, 144 U. S., 408, 417, 12 Sup. Ct., 679, 36 L. Ed., 485, and authorities there cited; *Railway Co.* v.

Cox, 145 U. S., 593, 606, 12 Sup. Ct., 905, 36 L. Ed., 829; *Gardner* v. *Railroad Co.*, 150 U. S., 349, 361, 14 Sup. Ct., 140, 37 L. Ed., 1107.)

The other errors assigned relate to the refusal of the court to give instructions to the jury as requested by the railway company. We shall not review these instructions, because it would be impossible, in the absence of the whole charge, to decide whether or not the court erred in refusing to give any of the requested instructions. The record does not contain the entire charge of the court to the jury. It does show that the railway company took exceptions to two points that were contained in the charge, and that upon both of these points the exceptions of the railway company were allowed by the court. For aught that appears from the record, the court, of its own motion, may have properly instructed the jury upon all the points sought to be raised by the assignments of error. When the entire charge is not given in the record it is the duty of the appellate courts to presume that the requested instructions were refused because substantially given in the general charge. (*Scaife* v. *Land Co.*, 33 C. C. A., 47, 90 Fed., 238, 246; *Case* v. *Hall*, 36 C. C. A., 259, 94 Fed., 300, 302; *Myers* v. *Sternheim*, 38 C. C. A., 345, 97 Fed., 625; *Railway Co.* v. *Wineland*, 42 C. C. A., 588, 102 Fed., 673, 676; *Insurance Co.* v. *Payne*, 45 C. C. A., 193, 105 Fed., 172, 176; *Reagan* v. *Aiken*, 138 U. S., 109, 113, 11 Sup. Ct., 283, 34 L. Ed., 892; *Andrews* v. *U. S.*, 162 U. S., 420, 424, 16 Sup. Ct., 798, 40 L. Ed., 1023.)

In *Myers* v. *Sternheim* (*supra*) this court said:

> The only other point relied upon by the plaintiff in error arose out of exceptions to the charge of the court, but a reference to the record shows affirmatively that the plaintiff in error has brought up only a part of the court's charge, and there is nothing to indicate that the omitted portion had no bearing upon the point made. Under such circumstances we would not be justified in reversing the judgment, even if in the portion of the charge brought here error appeared, since in the portions of the charge omitted the error, if any, may have been corrected.

The judgment of the circuit court is affirmed, with interest and costs.

O

DEFECTIVE SAFETY APPLIANCES.

DECISION OF UNITED STATES CIRCUIT COURT.

VOELKER v. CHICAGO, M. & ST. P. RY. CO.

(Circuit court, N. D. Iowa, E. D. June 16, 1902.)

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1. INJURY TO EMPLOYÉ—NEGLIGENCE—PLEADING—DEFECTIVE CAR COUPLER.

Two acts of negligence as causes of the accident, one being the use of a car on which the coupler was in such condition that it would not work properly and couple by impact, are charged by a petition which at length describes the faulty condition of the coupler, avers that its condition was due to defendant's negligence, and made it necessary for plaintiff's intestate to go between the cars, and that, while there, other cars were negligently kicked against the cars to be coupled, causing him to be crushed.

2. SAME—STATUTES—PLEADING.

That the statute may avail plaintiff, it is not necessary or permissible that the petition in an action for injury from a defective car coupling cite or refer to act Cong. March 2, 1893, relative to couplings on cars used by carriers in interstate commerce.

3. SAME—RIGHT TO BENEFITS.

Though an employé, in an action for injury from defective car coupling, does not, by his argument or otherwise, indicate that he is relying on act Cong. March 2, 1893, relative to couplings on cars of carriers engaged in interstate commerce, the court may and should instruct as to his rights thereunder.

4. NEW TRIAL—SURPRISE.

Though defendant was taken by surprise by the court's calling the attention of the jury to a statute, this is not ground for new trial, it having made no request when the court, at the end of the charge, inquired whether there was any point or matter as to which instruction was desired, and it not being shown or claimed that defendant has evidence which will change the facts on which the court held the statute was to be considered.

5. SAME.

Defendant having known the condition of a car coupler was an issue of fact in the case, and the question of its actual condition having been thoroughly gone into, and evidence having been introduced by both parties, it can not have a new trial on the theory that if it had foreseen the court was going to cite a statute on the question of the legal obligation resting on it as to couplers it might perhaps have had further evidence on the question of fact.

6. INSTRUCTIONS—PLEADINGS AND EVIDENCE.

Though a petition in action for injury from a defective car coupling does not allege that the car was used in connection with interstate commerce, the fact appearing in the evidence, the court may instruct that act Cong. March 2, 1893, is applicable.

7. MASTER AND SERVANT—CAR COUPLERS.

Act Cong. March 2, 1893, requiring cars used in moving interstate commerce to be equipped with couplers coupling automatically, applies to a car designed for interstate traffic, though at the time being hauled empty.

8. SAME—PROXIMATE CAUSE—CONCURRENT CAUSES.

Failure to equip a car with a coupler coupling automatically, by reason of which a car coupler was obliged to go between the cars, where he was crushed, is a proximate cause of the accident, though the cars were forced together by the negligent kicking of other cars against them.

9. SAME—CAR COUPLERS.

A carrier, by permitting couplers, originally sufficient, to become worn out and inoperative, is within the prohibition of act Cong. March 2, 1893, against using cars in interstate commerce not equipped with couplers coupling automatically.

10. SAME—ASSUMPTION OF RISK—INSTRUCTION.

It must be shown that an employé, claimed to have assumed the risk of the manner in which work was done, knew, or had means of knowing, how it was done; and an instruction that, if it was the custom to do the work as it was done when he was injured, he assumed the risk, is properly refused, no reference being made to knowledge or means of knowledge.

11. SAME—CUSTOM—APPLICABILITY.

The question of the custom of kicking back cars, under ordinary circumstances, without notice, is immaterial, but that of ordinary care under an exceptional situation is presented where the first cars kicked down did not, by reason of a defective automatic coupler, couple to the standing car, but separated from it a few feet, and deceased went between them to manipulate the coupler, and other cars were kicked back, crushing him; and it was claimed that the circumstances were sufficient to show the other members of the switching crew that the first coupling had not been made, and that he had gone between the cars.

12. DEATH—EXCESSIVE DAMAGES.

Verdict for $9,000 for death of a man 29 years old, with a life expectancy of 35 years, he being sober, industrious, and of good habits, and earning from $75 to $78 per month, is not so excessive as to justify reduction.

13. PLEADINGS—AMENDMENTS—VARIANCE.

Under Code Iowa, sec. 3597, making variance immaterial where the adverse party was not actually misled to his prejudice, and providing for amendment only where such party was so misled, plaintiff need not file an amendment to petition, because of variance, where defendant is estopped to say that it was misled thereby.

Submitted on motion for new trial filed on behalf of the defendant.

McCarthy, Kenline & Roedell, for plaintiff.

W. J. Knight, for defendant.

SHIRAS, *District Judge:*

This case came up for trial at a former day of the term before a jury, and it then appeared that the plaintiff was the administratrix of the estate of Emil Voelker, and in that capacity had brought this action against the defendant railway company to recover damages for the death of Emil Voelker, which had been caused by his being caught

between two cars in the yards of the defendant company at Dubuque, Iowa, on the 9th of September, 1901, while he was in the employ of the company as a switchman. The evidence showed without contradiction that the defendant company, on the 8th day of September, brought a loaded freight car from Spalding, Ill., through Savanna, Ill., to Dubuque, Iowa, the train of which the car formed part reaching the yards at Dubuque about 4 o'clock in the afternoon; and on the next morning the switching crew to which Emil Voelker belonged went to work in the yards, under charge and direction of Mr. Allgeyer as foreman. The car in question was then on what is called the "east freight track," and the switching crew undertook the work of sending down upon this track and coupling to the standing car other cars brought from the main line, which were taken by the locomotive easterly upon the main line beyond the switch connecting the east freight track therewith, and then, by a backward movement of the engine, the cars were kicked down on the east freight track. By the direction of the foreman, Voelker rode down upon the first set of cars thus kicked back for the purpose of coupling them to the standing car, and while engaged in endeavoring to fix the coupler upon the standing car so that it would couple with the other cars he was crushed between the cars, receiving injuries which resulted in his death. The evidence proved clearly that the coupler on the standing car was out of order to such an extent that it would not couple automatically or by impact with the other cars, and the evidence justified the finding that when Voelker discovered that the coupler was out of order he immediately undertook to fix it so the coupling might be made, and while so engaged he was caught between the cars, and received the injuries causing his death. Upon the trial of the case the jury returned a verdict in favor of the plaintiff, the damages awarded being $9,000, and the defendant now moves for a new trial on various grounds.

In the charge of the court the jury were instructed that if the evidence proved that the car in question was brought by the defendant company from a point or station in Illinois to Dubuque, Iowa, then the company, in handling the same, was engaged in interstate traffic, and was subject to the provisions of the act of Congress approved March 2, 1893, and entitled "An act to promote the safety of employés and travelers upon railroads, by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with drive-wheel brakes, and for other purposes" (27 Stat., 531). In support of the motion for a new trial it is earnestly contended that neither in the allegations of the petition nor in putting in the evidence did plaintiff base the case on the provisions of the act of Congress, and that the defendant was wholly taken by surprise by the action of the court in instructing the jury with respect to the duties imposed upon the company as a common carrier engaged in interstate traffic by the provisions of this

act. The general rule invoked by the defendant that a plaintiff, to recover, must bring his proof within the allegations of his petition or declaration is not questioned, but the real inquiry is whether there was such a departure between the case declared on in the petition and the case made by the evidence that the latter will not fairly support the former. Turning to the petition, we find it therein stated:

"That on September 9, 1901, there was, among others, upon said track a loaded car, which was to form a part of a train then being made up by defendant's switching crew for early movement, under the orders and directions of defendant's yard master and foreman of said switching crew; that unknown to plaintiff's intestate, Emil Voelker, who then was employed as car coupler and field man of said switching crew, defendant negligently permitted the coupler on the northerly end of said car to become and remain inoperative and defective in that the link connecting the lever and the pin was loose, broken, and disconnected, so that the pin and coupler could not be operated by means of the lever, and the said coupler was so old, worn, and rickety that the pin could not be raised because of the tumbler pressing and resting against the frame of the coupler, thus making it necessary, in order to operate the coupler, to go between the cars, insert the hand in the coupler, push the tumbler away from the frame, and then raise the tumbler and pull the knuckle open; * * * that by reason of the inoperative and defective condition of the coupler aforesaid said Emil Voelker was unable to make the coupling, and the knuckles on both couplers being closed, no coupling was made when the cars bumped together, and the cars separated a few feet on account of the jar; that thereupon, as was his duty and the usual practice, said Emil Voelker went between the cars to open the knuckle, in order that the coupling might be made by impact, and while thus engaged and unaware of the danger to which he was exposed, said switching crew, while acting within the scope of their employment, and knowing that said Emil Voelker went between said cars to couple the same, negligently caused two or more other cars to be kicked with great force onto said east freight track and against the cars between which said Emil Voelker was thus occupied, thereby causing said Emil Voelker, without any fault on his part, to be crushed to his death between the drawbars on said cars; that defendant and its said employés, without fault of said Emil Voelker, negligently and carelessly moved said cars as aforesaid, while he was thus engaged, without signal from him, although the general practice then and long prior thereto required that said cars be not moved while he was thus occupied between the cars without signal from him, and he believed that said practice would be followed while he was so engaged in the performance of his employment; that defendant knew, or by the exercise of ordinary diligence could and should have known, of the defective and inoperative condi-

tion of the coupler aforesaid before the death of said Voelker, and in time to have remedied the same."

It is claimed on behalf of the defendant that the facts thus recited in the petition were intended to charge only one act of negligence, to wit, kicking back the cars without giving any notice or warning, when it was known to the other employés that Voelker was between the cars and therefore in a place of danger. The merest cursory reading of the petition shows that such could not have been the thought of the pleader in preparing this petition. Had it been the purpose to make only one charge of negligence, based upon the manner in which the second set of cars were kicked back, it would only have been necessary to aver that Voelker while engaged in the line of his duty in preparing the coupler upon the standing car was called upon to place himself on the track at the end of the car, and was thus caught by the other cars; but instead of limiting the averment of facts to this statement in substance, the pleader at considerable length described the faulty condition of the coupler, avers that its condition was due to the negligence of the company, and that its faulty condition was what caused Voelker to place himself in a position where he was liable to be caught if the other cars were moved down in order to make a coupling. Properly construed, the petition charges two acts of negligence as the causes of the accident, not taking into consideration the charge of negligence in the use of a road engine for switching work; and certainly the allegations of the petition were sufficient to give notice to the defendant that it was charged with negligence in that it was using a car upon which the coupler was in such condition that it would not work properly, and would not couple by impact. Upon the trial both parties introduced evidence upon this matter of the condition of the coupler, and much time was taken up in the introduction of testimony upon this point, and there is, therefore, no sufficient foundation upon which to base the claim that the defendant was not duly warned of the fact that the condition of the coupler was an issue in the case as one of the grounds upon which it was charged with negligence.

It is said, however, that the defendant was taken unduly by surprise, in that the court, in the charge to the jury, cited the provisions of the act of Congress of March 2, 1893, as applicable to the case, it being claimed that neither in the pleadings nor in the argument of counsel for plaintiff was any reference made to the act of Congress As matter of pleading, it certainly can not be said that, in order to base a right of recovery on the provisions of the statute, it was necessary to cite the statute or its provisions in the petition. The petition in set words charged the defendant with negligence in having and operating a car upon which was a defective, worn-out, and inoperative coupler, which would not couple by impact. Charging the defendant with negligence was charging that the company had not met or ful-

filled the duty imposed upon it by law with respect to having and keeping the coupler upon the car in proper condition for use. It was not necessary nor, indeed, permissible, under the rules of pleading, that the petition should set forth the law which had been violated. It is not for one moment supposable that the officers of the defendant company, or the learned counsel representing it in this case, are not, and were not when this action was commenced, fully aware of the provisions of the act of Congress of March 2, 1893, and of the acts of the general assembly of the State of Iowa which now form sections 2079 to 2083, both inclusive, of the code of the State, and therefore knew that as to cars used in interstate traffic the obligations of the act of Congress were in force, and as to cars used within the State of Iowa the named sections of the code were applicable. Therefore when the petition charged the defendant with negligence with respect to the coupler upon the car, the defendant must have known that, as the car was used in interstate traffic, the act of Congress would necessarily come into consideration in defining the obligations resting upon the defendant company. It is true, as urged by counsel for the defendant, that in the argument of the case on behalf of plaintiff no reference was made to the act of Congress. In fact, counsel did not discuss the law at all in their argument. They addressed the jury only, and if it be true that the line of argument to the jury would indicate that counsel were relying on common-law rules only, yet certainly that did not prevent the court from calling the attention of the jury to the provisions of the act of Congress if properly construed it had a bearing on the case. No matter what the views of counsel are upon the law of the case as expressed in their arguments, it is the duty of the court to give to the jury the law applicable to the facts as the court understands it. If the law as given to the jury is applicable to the facts before them, no error is committed. If the law, as given, is not applicable, that is error, and cause for reversal; but the applicability of the law given is not dependent on the views of the counsel as expressed or omitted to be expressed in their argument before the jury.

But admitting to the fullest extent the claim now advanced that the counsel for defendant were taken by surprise by the action of the court in calling to the attention of the jury the named act of Congress, is this matter of surprise any sufficient reason for granting a new trial? At the close of the charge to the jury the court, following its usual custom, inquired of counsel whether there was any point or matter touching which counsel desired the jury to be instructed which was not covered by the charge as given. The opportunity was certainly given to the defendant, if it has been misled as to the issues in the case, to have then called the attention of the court thereto, and asked leave to introduce further evidence, if that were necessary, or

to be heard upon the questions of law, which had not been presented in argument. No such requests were made, and the case went to the jury under the instructions as originally given. Furthermore, it is not now shown or claimed that the defendant has evidence at command which would change the facts upon which the court held that the act of Congress was to be considered in determining the legal obligations resting upon the defendant. It is not claimed that upon a new trial it would be shown that the defendant company was not engaged in interstate traffic as a common carrier, or that the car with the defective coupler was not a loaded car, brought by the defendant from a station in Illinois into the State of Iowa. In the written brief submitted by the defendant in support of the motion for a new trial it is said:

"Had defendant known that it was to be contended that it had violated the act of Congress, it could have prepared its case to meet such contention, and perhaps would have produced evidence to show that the act of Congress had not been violated because of the then condition of the coupler on the car. At all events, it ought to have been given an opportunity to do so, if it could."

The question of the actual condition of the coupler was thoroughly gone into before the jury, and evidence was introduced by both parties on this issue. The defendant well knew that the condition of the coupler was an issue of fact in the case and had full opportunity to introduce all the evidence at its command on this point, and it certainly is not entitled to a new trial upon the theory that if it had been foreseen that the court was going to cite the act of Congress upon the question of the legal obligation resting upon the defendant, it might perhaps have had further evidence on the issue of fact. The defendant well knew the significance in the case of the question about the condition of the coupler and undoubtedly brought forward all the evidence available to it on that question. Under such circumstances it can not be supposed that the court would be justified in granting a new trial upon the bare statement that perhaps it might be shown that the condition of the coupler was not in violation of the act of Congress.

It is next contended that it was error on the part of the court to call the attention of the jury to the provisions of the act of Congress, because it was not averred in the petition that the defendant had hauled or permitted to be used on its lines the car in question, or that it was hauled or used in connection with interstate traffic. When it became the duty of the court to instruct the jury upon the law, it clearly appeared in the evidence that the car in question, being loaded with coal, had been brought from Illinois to Iowa. It was left to the jury to find the fact, under the evidence, whether the car was brought by the defendant company from the one State into the other, the jury being instructed that if they so found, then the defendant in so trans-

porting the car was engaged in interstate traffic, and in such case the act of Congress would be applicable to the case. Would it not have been error, under these circumstances, if the court had instructed the jury that the act of Congress had no relation to the case before them? Is it not true that a railway company is engaged in interstate traffic, within the meaning of the act of Congress, when it brings loaded cars from one State into another? But it is said that—

"It was a mistake to instruct that if the jury believed the car was brought from Illinois to Iowa, then defendant, in transporting it, was engaged in interstate commerce. This, we submit, would be an assumption of the fact to be alleged and proved—i. e., that the car had been used in moving interstate commerce."

If by this contention it is meant to assert that in order to come within the purview of the act it must be shown that at the time of the accident the car was loaded with freight which had been brought from another State, the answer is that the evidence proved such to be the fact in this case. But further, that is not the proper construction of the act. The statutes, State and Federal, requiring railway companies to equip their cars with automatic couplers were not enacted to protect the freight transported therein, but for the protection of the life and limb of the employés who were expected to handle these cars. The beneficent purpose of these statutes is defeated if the employés are required to handle cars not equipped as required by the statutes, without regard to the question whether the cars are loaded or not. Legislation on this matter of the use of automatic couplers was sought and obtained from Congress, as well as from the State legislature; so that the companies would not be afforded a loophole for escape from liability on the theory that the agencies used in interstate commerce are without the control of the State legislation. When companies, like the defendant in this case, are engaged in interstate traffic, it is their duty, under the act of Congress, not to use, in connection with such traffic, cars that are not equipped as required by that act. This duty of proper equipment is obligatory upon the company before it uses the car in connection with interstate traffic, and it is not a duty which only arises when the car happens to be loaded with interstate freight. It frequently happens that the railway companies load cars with live stock or farm produce in the Western States and carry the same to the Eastern markets, and then return these cars without a load; but it can not be true that on the eastern trip the provisions of the act of Congress would be binding upon the company, because the cars were loaded, but would not be binding upon the return trip, because the cars are empty. Whatever cars are designed for interstate traffic, the company owning or using them is bound to equip them as required by the act of Congress; and when it is shown, as it was in this case, that a railway company is using the car for transportation purposes between the

two States, sufficient is shown to justify the court in ruling that the act of Congress is applicable to the situation.

It is next assigned as ground for a new trial that "it was error to leave it to the jury to find that the condition of the coupler was a proximate cause of the injury," it being claimed that the allegations of the petition and the evidence show that the alleged negligent kicking of the cars was the proximate and sole culpable cause of the injury. As already stated, the petition sets forth the faulty and inoperative condition of the coupler as one of the grounds of negligence charged against the defendant, and the evidence made it one of the vital issues in the case; but it is argued that, even if, through the negligence of the company, the coupler was inoperative and in bad condition, this condition of the coupler was not a proximate cause of the accident, because Voelker would not have been crushed if the other cars had not been kicked back, and therefore the latter act must be deemed to be the sole and proximate cause of the accident. If this line of reasoning is to be followed it would result that the act of kicking the cars back could not be deemed to be a proximate cause of the accident, no matter how negligently they were handled, because the mere movement of the cars would not produce injury, unless some one got in the way thereof, and, as the accident would not have happened if Voelker had not gotten upon the track, therefore the proximate and sole cause of the accident was the act of Voelker in going upon the track, and therefore neither the negligence of the company in using a car upon which the coupler was out of order, nor the negligent manner in which the cars were kicked back, could be relied upon as creating a cause of action against the company. The statutory requirement with respect to equipping cars with automatic couplers was enacted in order to protect railway employés, as far as possible, from the risks incurred when engaged in coupling and uncoupling cars. If a railway uses in its business cars which do not conform to the statutory requirements, either because they never were equipped with automatic couplers, or because the company, through negligence, has permitted the couplers, originally sufficient, to become worn out and inoperative, then the company is certainly not performing the duty and obligation imposed upon it by the statute, and is clearly, therefore, chargeable with negligence in thus using an improperly equipped car; and the company is bound to know that if it calls upon one of its employés to make a coupling with a coupler so defective and inoperative that it will not couple by impact, and that to make the coupling the employé must subject himself to all the risks and dangers that inhered in the old and dangerous link-and-pin method of coupling, it is subjecting such employé to the very risk and danger which it is the purpose of the statute to protect him against, so far as that is reasonably possible. Subjecting an employé to risk to life and limb by calling upon him to use appliances which

have become defective and inoperative through the failure to use proper care on part of the master is certainly negligence, which will become actionable if injury results therefrom to the employé, and liability therefor can not be avoided by the plea that if the company was thus guilty of actionable negligence in this particular it can not be held responsible therefor because it was guilty of another act of negligence which aided in causing the accident. This accident happened because Voelker, in the performance of his duty, was called upon to place his person in a position where he might be caught between the cars he was expected to couple together. He was required to place himself in this dangerous position because of the negligent failure of the company to have upon the car a coupler in proper and operative condition, and certainly this negligent failure of the company was a proximate cause of the accident.

It is also contended that the court erred in not giving two instructions asked by the defendant to the effect that if it was the general and uniform custom in the yard to kick cars down to a "field man," so called, without giving him any notice or warning, and Voelker remained working in the yard while this custom was observed, then there could be no recovery for any injury done him because of the kicking of cars to him without giving him notice or warning that it was to be done. The instructions as asked are open to the criticism that no reference is made to the knowledge or means of knowledge on part of Voelker. When the claim is made that an employé has assumed the risk caused by the manner in which the business of the master is conducted, it must be shown that the employé knew, or had means of knowing, the manner in which the work was done, so that the inference may be fairly drawn that by continuing in the employ of the master, having knowledge, or its equivalent, of the risks to which he would be subjected, he intended to assume such risks. But, waiving this objection, the instructions as asked were not applicable to the issue of negligence charged in the petition, and which there was evidence to sustain. The defendant introduced evidence to the effect that it was expected that the field man would look out for himself, and that it was not the rule or custom to give him warning when cars were about to be kicked back in the direction of the field man; and doubtless this is true under ordinary circumstances. Thus, if the cars which Voelker rode down had coupled with the standing car, it might well be that other cars could have been safely sent back without giving him notice or warning, and he could readily have protected himself from danger caused thereby. But the fact was that the first cars sent down did not couple to the standing car, and the claim of the plaintiff is that when the cars struck, and the coupling was not made, they separated some few feet, and then Voelker undertook to manipulate the coupler so that it would couple, and while he was thus

engaged, without any signal from him and without any notice to him, another set of cars were kicked back, resulting in again forcing the cars together and crushing Voelker between them. The claim of the plaintiff and the issue presented by the facts was that the circumstances were sufficient to show that the expected coupling had not been made, and that Voelker had disappeared from the sight of the other members of the switching crew, evidently because he had gone between the cars, and therefore it was the duty of the others not to throw back another set of cars until they had received a signal from Voelker showing that it could be done with safety. The case did not make material the question of what the custom or practice was with respect to kicking back cars under ordinary circumstances, but did present the question whether ordinary care had been exercised in view of the exceptional situation created by the use of a defective and inoperative coupler, which resulted in a failure to couple the cars by impact, and required Voelker to place himself in a position of danger.

It is finally urged that the amount of damages awarded is excessive, and is not sustained by the evidence. It was shown that the deceased was 29 years of age at the date of his death, and his expectancy was 35 years; that deceased was sober, industrious, and of good habits, and was earning from $75 to $78 per month. At the former figure he was earning $900 per year, which rate of earning, continued for 35 years, would make the aggregate sum of $31,500. The jury awarded as damages the sum he would have earned in 10 years, and the court can not say that this sum is excessive. It is a liberal allowance, but not so excessive as to justify the court in reducing the same.

Counsel for plaintiff has asked leave to file an amendment to the petition in case the court should hold that the allegations of the petition were lacking in any substantial particular, the application for leave to amend being based upon the provisions of section 3597 of the code of Iowa, which enacts that—

"No variance between the allegations in a pleading and the proof is to be regarded as material unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it is alleged that a party has been so misled, that fact must be shown by proof to the satisfaction of the court, and such proof must also show in what respect he has been so misled, and thereupon the court may order the pleading to be amended upon such terms as may be just."

Amendments of this character may be allowed after verdict and judgment have been entered. *Davis* v. *Railway Co.*, 83 Iowa, 744; 49 N. W., 77. Under the provisions of this section, in order to obtain a reversal of a judgment or a new trial on the ground of a variance between the allegations of a pleading and the proof, it must be proven to the satisfaction of the court that the party has been misled to his

injury. Such proof has not been made in this case. As already set forth, if the defendant, when the charge was given to the jury, had then claimed that there was a material variance between the allegations and the proof offered in the view taken thereof by the court, the situation could have been properly dealt with. The defendant did not then suggest that there was a variance between the allegations of the pleading and the evidence introduced, nor did the defendant suggest that it had been in any way misled with respect to the issues involved in the case or that it was taken by surprise by the charge of the court with regard to the issues involved in the controversy. Under these circumstances the defendant can not now be heard to say that it was misled by the action of the court or by any variance between the allegations of the petition and the evidence introduced, and therefore there is no need for filing an amendment on behalf of the plaintiff.

The motion for new trial is overruled and judgment will be entered on the verdict in favor of plaintiff.

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DEFECTIVE SAFETY APPLIANCES.

DECISION OF UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

No. 1842. December Term, A. D. 1903.

CHICAGO, MILWAUKEE AND ST. PAUL Railway Company, plaintiff in error, v. ELIZABETH A. VOELKER, ADMINISTRATRIX, etc., defendant in error. } In error to the circuit court of the United States for the northern district of Iowa.

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1. Section 2 of the Federal safety appliance act of March 2, 1893, which prohibits the use of any car used in moving interstate traffic "not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars," calls for couplers which dispense with the necessity of men going between the ends of the cars whether engaged in the act of coupling or in that of uncoupling. The purpose of this requirement is the protection of the lives and limbs of men, and such statutes, when the words fairly permit, are so construed as to prevent the mischief and advance the remedy. The mischief to be prevented is unnecessary exposure to injury, and rests quite as much in the act of coupling as in that of uncoupling.
2. The preparation of the coupler for the impact is not distinct from the act of coupling. The preparation of the coupler and the impact are connected and indispensable parts of the larger act which is regulated by the statute, and the performance of which is intended to be relieved from unnecessary risk and danger.
3. A car coupler which has been permitted to become and remain inoperative so that the lever will not lift the pin from the socket, and the knuckle can not be drawn open by leaning toward the coupler and using one hand, but to open it requires the presence between the ends of the cars, and between the drawbars, of the entire body of the person attempting to make the coupling, and also the use of both hands, does not satisfy the Federal statute or the statute of the State of Iowa, and the use of such a coupler constitutes actionable negligence.
4. A shipment originating in one State and moved into another is impressed with the character of interstate traffic, whether the ultimate destination of the shipment be near or remote, and this interstate character will follow the shipment until the actual transit ceases. A car used in moving such shipment and which is loaded therewith remains subject to the Federal safety-appliance act until its use in moving the shipment is ended, notwithstanding its transit may be temporarily but not indefinitely suspended.

5. A switchman engaged in handling a freight car having a defective coupler, on a track which is principally used for handling freight trains, though sometimes cars are brought thereon in need of repairs, does not, in the presence of section 8 of the Federal safety-appliance law, assume the risk arising from the defect in the coupler, when he is not engaged in moving the car as one in bad order with a view to its isolation or repair.
6. Where it is the general and uniform custom in a railroad yard to kick cars down to a fieldman without giving him notice or warning, a fieldman who is aware of such custom and remains in that service assumes the risk of injury arising from the observance of the custom.

Decided March 26, 1904.

Mr. W. J. Knight and *Mr. H. H. Field*, for plaintiff in error.

Mr. H. C. Kenline, *Mr. J. J. McCarthy* (*Mr. R. P. Roedell* was with them on the brief), for defendant in error.

Mr. George Crane, Assistant United States attorney, *amicus curiæ*.

Before SANBORN, THAYER, and VAN DEVANTER, Circuit Judges.

This was an action to recover damages for the death of Emile Voelker, occurring while he was engaged in coupling cars at Dubuque, Iowa, in the service of the railway company. After describing defendant company as a Wisconsin corporation "engaged in operating a line of railway through the State of Iowa," and having upon one of its yard tracks at Dubuque "a loaded car which was to form a part of a train then being made up * * * for early movement," and after describing Voelker as a car coupler and fieldman in the switching crew which was making up this train, the petition charged two acts of negligence on the part of the company as proximate causes of Voelker's death: (1) "Defendant negligently permitted the coupler on the northerly end of said car to become and remain inoperative and defective in that the link connecting the lever and the pin was loose, broken, and disconnected, so that the pin and coupler could not be operated by means of the lever, and the said coupler was so old, worn, and rickety that the pin could not be raised because of the tumbler pressing and resting against the frame of the coupler, thus making it necessary, in order to operate the coupler, to go between the cars, insert the hand in the coupler, push the tumbler away from the frame, and then raise the tumbler and pull the knuckle open. * * * Defendant knew, or by the exercise of ordinary diligence could and should have known, of the defective and inoperative condition of the coupler aforesaid before the death of said Voelker and in time to have remedied the same." (2) "The general practice recognized and known by defendant, then and many years prior thereto in force, was for car couplers to go between the cars and open the knuckles whenever the same could not be operated by means of the lever." Voelker accordingly went between this and another car which were separated a few feet "to open the knuckle, in order that the coupling might be made by impact, and while thus engaged, and unaware of the danger to

which he was exposed, said switching crew, while acting within the scope of their employment and knowing that said Emil Voelker went between said cars to couple the same, negligently caused two or more other cars to be kicked with great force * * * against the cars between which said Emil Voelker was thus occupied * * * without signal from him, although the general practice then and long prior thereto required that said cars be not moved while he was thus occupied between the cars, without signal from him."

Defendant's answer denied the statements of the petition, other than those relating to the citizenship of the parties, charged that Voelker's death was the result of his own contributory negligence, and alleged that the track where he was injured was prior to and all during his service used to set out and handle thereon cars having some defect in them and needing repairs, as well as other cars not defective; that this was known to him or could have been ascertained by the exercise of ordinary care; that with this knowledge or means of knowledge he remained in the company's service and continued to work on that track without objection or complaint and therefore assumed the risk of meeting and working with defective cars at that place.

At the trial these facts were established: The car in question was loaded with coal and was brought by defendant over its line of railroad from a station thereon in the State of Illinois and reached defendant's yards at Dubuque, Iowa, about 5 o'clock in the afternoon. About 8 o'clock the next morning, when the injury to Voelker occurred, the car was on a freight track principally or largely used in receiving incoming freight trains and making up outgoing freight trains. A switching crew, in which Voelker was acting as car coupler and fieldman, was then engaged in shifting about and coupling this coal car and several other loaded cars. While Voelker was between the coal car and another car, separated by a distance of about 10 feet, and was engaged in adjusting the coupler on the coal car so that it would couple automatically upon impact the two cars came together, catching him between the draw bars, and crushed him to death. He was 29 years old and had been in defendant's service as brakeman and switchman eight years. In respect of several other matters the evidence was conflicting. The jury returned a verdict for plaintiff on which judgment was rendered, to reverse which the railroad company prosecutes this writ of error.

VAN DEVANTER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is entirely clear that the trial proceeded upon the theory that plaintiff's petition charged two acts of negligence on the part of the railway company as proximate causes of Voelker's death—first, permitting the coupler upon the coal car to become inoperative and

defective; and, second, kicking or sending other cars against the cars between which Voelker was engaged without a signal from him and contrary to a general and established practice. Each party without objection from the other introduced evidence bearing directly upon each charge of negligence and not otherwise relevant to the issues. The court also instructed the jury upon this theory. The contention on behalf of the railway company, that the case was tried upon the theory that the petition charged the negligent kicking or sending of other cars against those between which Voelker was engaged as the sole proximate cause of the injury, is not supported by the record, but is refuted by it.

The evidence relating to the condition of the coupler on the coal car was conflicting, but substantial evidence was produced by plaintiff to the effect that it was equipped with a coupler known as "Hein No. 1" which originally, and when in good condition, could be prepared for coupling, and would couple automatically by impact, without the necessity of anyone going between the ends of the cars, in the sense of putting the body entirely between them, but that at the time of the injury to Voelker this coupler had become so defective and inoperative that when the knuckle thereof was closed it was necessary for some one to go completely between the cars to open it and thereby prepare the coupler for the impact; that this condition of the coupler had existed for such a length of time as to charge the railway company with notice, and that at the time of the injury the knuckle was closed and, in the discharge of his duty as a switchman, Voelker was entirely between the ends of the cars engaged in preparing the coupler for the impact by opening the knuckle, a task made difficult by the defective and inoperative condition of the coupler. In view of this evidence, and the established facts shown in the statement before made, the court in substance said to the jury that it would be assumed that they would find from the evidence that defendant was a common carrier engaged in interstate commerce by railroad and that the coal car was being used by defendant on its line of railroad in moving interstate traffic, and then instructed them that the branch of the case resting upon the condition of the coupler was controlled by the act of Congress of March 2, 1893 (27 Stat., 531; 3 U. S. Comp. St., 1901, p. 3174), relating to safety appliances to be provided and maintained by such common carriers.

This is assigned as error, and in support of the assignment it is urged: First, that the act of Congress does not forbid the use of a car having an automatic coupler "to prepare which for the impact" it is necessary to go between the ends of the cars, but is satisfied with a coupler which when so prepared will couple automatically by impact; that the terms of the Congressional act are such "that the test of a man going between the ends of the cars is applied to uncoupling only, and

that no such test is applied to coupling," and that plaintiff's petition and the evidence show Voelker "was not attempting to make a coupling," but was simply opening the knuckle of the coupler, the defect in which, if it were defective, did not prevent it from coupling automatically by impact when open, but merely rendered it more difficult to open the knuckle or prepare the coupler for the impact; second, that there is no evidence but that the car had reached its destination, or that it was intended to be thereafter used in moving interstate traffic; and third, that plaintiff's petition does not allege that defendant was a common carrier engaged in interstate commerce by railroad or that the coal car was being used on defendant's line of railroad in moving interstate traffic, and, therefore, does not state a case controlled by the act of Congress.

The first section of the safety appliance act of Congress of March 2, 1893, requires "every common carrier engaged in interstate commerce by railroad" to equip its engines and trains used in moving interstate traffic with a system of train brakes which will enable the engineer to control the speed of the train. The second section declares:

"That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

A statute of Iowa enacted April 6, 1892, sections 2097, 2080, Code 1897, declares:

"After January 1, 1898, no corporation, company or person, operating a railroad, or any transportation company using or leasing cars, shall have upon such railroad in this State any car that is not equipped with such safety automatic coupler," namely, "with automatic couplers so constructed as to enable any person to couple or uncouple them without going between them."

While there is some difference in the words by which these statutes describe the type of coupler with which each requires cars coming within its operation to be equipped, we think both apply the test, of whether the person operating the coupler is required to go between the ends of the cars to the act of coupling as well as to that of uncoupling. The risks and dangers which attended the old link and pin system, when couplings and uncouplings were effected by going between the cars, were such a menace to the lives and limbs of those employed in that branch of the railroad service, and these risks and dangers inhered so largely in the act of going between the cars, whether in the act of coupling or uncoupling, that there can be no doubt of the purpose of the Congressional enactment as well as of that of the State to obviate and prevent this act of exposure, which the invention and use of automatic couplers had demonstrated to

be wholly, or at least largely, unnecessary. The State statute plainly and without uncertainty calls for "*automatic couplers* so constructed as to enable any person to *couple or uncouple them without going between them.*" If there be uncertainty in the Congressional act it is obviated by merely inserting a comma after the word "uncoupled" in that portion of the act which calls for "*couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.*" The concluding phrase then literally applies to both the coupling and uncoupling.

Punctuation is a minor and not a controlling element in interpretation, and courts will disregard the punctuation of a statute or repunctuate it, if need be, to give effect to what otherwise appears to be its purpose and true meaning. *Hammock* v. *Loan & Trust Co.*, 105 U. S., 77, 84; *United States* v. *Lacher*, 134 U. S., 624, 628; *United States* v. *Oregon, etc., Railroad*, 164 U. S., 526, 541; *Ford* v. *Delta, etc., Co.*, id., 662, 674; *Stephens* v. *Cherokee Nation*, 174 U. S., 445, 480; Sutherland Statutory Construction, sec. 232. Obviously the purpose of this statute is the protection of the lives and limbs of men, and such statutes, when the words fairly permit, are so construed as to prevent the mischief and advance the remedy. The mischief to be prevented rested quite as much in the act of coupling as in the act of uncoupling. Science had offered, and practical use had approved, a remedy applicable not alone to the act of uncoupling, but also to that of coupling. The two statutes, Federal and State, seem to have been enacted in pursuance of a common purpose to afford a remedy as broad as the mischief and to remove the source or cause of the latter through the compulsory adoption and use of a new system of coupling and uncoupling which dispensed with the necessity of any one going between, or at least entirely between, the cars.

The contention that the preparation of the coupler for the impact is distinct from the act of coupling is a mistaken attempt to separate a part of an act from the whole. The preparation of the coupler and the impact are not isolated acts, but connected and indispensable parts of the larger act which is regulated by these statutes and the performance of which is intended to be relieved of unnecessary risk and danger.

Counsel for the railroad company deny, and opposing counsel affirm, the existence at the time of the enactment of this legislation of any automatic coupler which could be prepared for the impact or coupling by manipulating a lever or otherwise without placing any portion of the body between the ends of the cars. The real situation then existing, if shown by evidence produced at the trial or by something of which judicial notice could be taken, might have an important bearing upon the true meaning of these statutes in respect of the extent to which it was intended to dispense with the necessity of going between the cars, but no evidence upon this point was presented by either party, and counsel have not attempted to call our attention to any-

thing which sustains either of their opposing assertions. An examination of public documents, possibly within the range of judicial notice, tends to confirm the assertion of counsel for plaintiff that such couplers were in existence and in actual use at that time, but we think a determination of this question is not necessary to a decision of this case. There is no doubt under the evidence but that this "Hein No. 1" coupler when in reasonably good condition is operated in this manner: The switchman, by depressing with one hand a lever at the corner of the car, lifts the pin from the socket in the coupler, and leaning *toward the coupler readily draws the knuckle open with the other* hand, an act which is performed in a brief space of time, with slight exertion, and without placing the body completely between the ends of the cars.

Plaintiff's petition complains, not of the type of coupler with which this car was equipped, but that defendant negligently permitted it to become and remain so defective and out of repair that it could not be operated in the usual manner; that the pin could not be lifted by means of the lever, and that it was necessary "to go between the cars, insert the hand in the coupler, push the tumbler away from the frame, and then raise the tumbler and pull the knuckle open." In their brief, counsel for plaintiff concede that if the coupler is operative and in good condition "this is a reasonably safe method of making the coupling," and that whether this coupler, when in such condition, fully conforms to the Congressional or State statute "is not a vital question in this case." For the present purposes it will, therefore, be assumed—a decision upon the question being unnecessary—that this coupler, if in reasonably good condition satisfied both statutes. But the evidence produced by plaintiff tended to show that the coupler was not in reasonably good condition; that it had been permitted to become and remain defective and inoperative; that the lever would not lift the pin from the socket; that the knuckle could not be drawn open by leaning toward the coupler and using one hand, but to open it required the presence between the ends of the cars, and between the draw bars, of the entire body of the person attempting it, and also the use of both hands, considerable strength, and more than the usual time, all of which greatly increased the risk and added to the danger of the undertaking. If this was the true condition of the coupler at the time of the injury it did not satisfy either statute and its use was violative of one or the other of them and constituted actionable negligence. Whether the violation was of the Congressional act or of the State statute depended upon whether defendant was a common carrier engaged in interstate commerce by railroad and was using the car in question on its line of railroad in moving interstate traffic.

We think there was evidence that the carriage or movement of the coal with which the car in question was loaded had not terminated, and that the coal was still actually in transit. The evidence contains

no suggestion that the car had reached the end of its journey, or that it was to remain indefinitely or for any considerable time on the track where it was at the time of the injury, or that the coal was to be unloaded there. The inference to be reasonably drawn from the evidence is that the car was then about to actively continue the journey toward the ultimate destination of the coal which it was carrying. Whether that was near by or remote is not material, because the shipment had originated in another State and was already impressed with the character of interstate traffic which would follow it at least until the actual transit ceased.

Defendant was clearly shown to be a common carrier engaged in interstate commerce by railroad, and to be using the car mentioned on its line of railroad in moving interstate traffic, and therefore the branch of the case relating to the condition of the coupler is controlled by the act of Congress and not by the State statute.

Plaintiff's petition states clearly enough that defendant was a common carrier engaged in commerce by railroad, and that it was using this car on its line of railroad in moving traffic. As stated, the case falls short of coming within the act of Congress only in that the petition does not allege the interstate character of the commerce in which defendant was engaged, or of the traffic which the car was moving. But whether the case stated is controlled by the act of Congress or the State statute it is one of actionable negligence, the right and measure of recovery for which are the same in either event and are to be ascertained and enforced by the same rules. Other allegations bring the case equally within the jurisdiction of the circuit court whether the violation was of one statute or of the other. Defendant offered no objection to the evidence which without conflict established, as before shown, the interstate character of the commerce in which defendant was engaged and of the traffic being moved by the car mentioned; nor does it appear that, in excepting to the instructions by which the court applied the act of Congress to this branch of the case, defendant put its exception upon the ground that the petition did not state a case arising in interstate commerce. Plaintiff was entitled to be seasonably apprised of the objection if it were intended to be relied upon, and doubtless the court would have permitted an amendment of the petition, as it is manifest the defendant was not misled or surprised by the variance. Under the circumstances the petition may well be considered as having been amended to conform to the facts proved. Iowa Code 1897, secs. 3597, 3600; U. S. Rev. Stat., sec. 954; *Roberts* v. *Graham*, 6 Wall., 578, 581; *Nashua Savings Bank* v. *Anglo-American, etc., Co.*, 189 U. S., 221, 231; *Haley* v. *Kilpatrick*, 44 C. C. A., 102, 104; 104 Fed., 647.

We are of opinion that no error was committed in instructing the jury that the branch of the case resting upon the condition of the coupler was controlled by the act of Congress.

It is assigned as error that the court in effect instructed the jury to disregard the defense of assumption of risk based upon the allegation, in defendant's answer, that the track on which the coal car was standing was used "to set out and handle thereon * * * cars having some defect in them and needing repairs, as well as other cars not defective," and that this was known to Voelker, or could have been ascertained by him by the exercise of ordinary care. The allegation is not that this was a hospital track, specially designed or used for isolating or holding cars in need of repair or for repairing them, or that the car in question was being moved with a view to its isolation or repair. Section 8 of the controlling act of Congress declares:

"That any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge."

The evidence, without any substantial conflict, showed that this track was principally used in actively handling freight trains and freight cars; that incoming trains were received thereon and the cars distributed therefrom; that outgoing trains were made up thereon and dispatched therefrom; that incoming trains sometimes brought thereon cars in need of repair and in some instances such cars were temporarily transferred thereto from other tracks; that there was in the yards at Dubuque a hospital track specially designed and used for isolating and holding cars in need of repair; that the practice was to inspect the cars of incoming trains and to mark those found in need of repair, commonly termed "bad order" cars, in such manner as to indicate their condition, preparatory to their proper disposition and as a warning to those handling them, and that at the time of the injury this car had not been marked or isolated as in bad order. There was no evidence that Voelker was engaged in moving the car as one in bad order with a view to its isolation or repair. Of this evidence it is sufficient to say, that working under such circumstances with a car in use contrary to the Congressional act does not, in the presence of section eight, amount to an assumption of the risk arising therefrom, and the court very properly instructed the jury to that effect.

As shown in the statement before made, plaintiff's petition rested the right of recovery upon two acts of negligence on the part of defendant, and as stated in the brief of counsel for plaintiff: "The case was tried to the jury upon the theory that the injury was the result of two concurring or proximate causes: (1) The defective and nonautomatic coupler; and (2) the negligent kicking down of the second cut of cars." It was therefore the right of each party to have the jury correctly instructed respecting each of the claimed acts of negligence the same as if the right of recovery rested upon it alone;

and, if there was material error in the instructions given or refused respecting either charge of negligence, the verdict, being general, can not stand.

The principle allegations constituting plaintiff's second charge of negligence were: First, the existence of a practice in defendant's yards at Dubuque, long recognized by defendant and amounting to a general custom, requiring when a car coupler, also called fieldman, is engaged between two cars in preparing them for coupling that other cars be not moved against those between which he is engaged without a signal from him; and, second, the kicking or sending of other cars forcibly against those between which Voelker was engaged without a signal from him and with knowledge of his exposed position between the cars.

The evidence shows that the coal car before mentioned was standing on a freight track distant about 800 feet from a switch which connected it with the main track; that the switching crew with an engine and twelve or thirteen cars approached the switch from along the main track and there kicked eight or nine of the cars onto the freight track with sufficient force to send them along that track to or near the coal car; that Voelker accompanied the moving cars, riding thereon, for the purpose of controlling their speed and of effecting a coupling between them and the coal car; that the switching crew then kicked two of the remaining cars down the main track, then kicked the other two cars onto the freight track with sufficient force to send them along that track to or near the cars first kicked thereon, and then followed the two cars sent down the main track. It was the theory of plaintiff's evidence that the cars last kicked onto the freight track moved along that track to the point reached by the cars first kicked thereon and struck them with such force as to move them against the standing cars and cause the injury to Voelker, who was then between the cars and engaged in opening the knuckle of the coupler on the coal car, as before stated. Whether the second set of cars actually reached those first sent along the freight track was, however, the subject of conflicting evidence, as was also Voelker's knowledge of the intention to send a second set of cars along that track. The switching crew did not know of Voelker's position between the cars or that there was occasion for him to go between them. He gave no signal to the switching crew indicating that there was occasion for him to go between the cars and no effort was made by them to apprise him of the approach of the second set of cars, excepting as it was claimed that he was informed before leaving the switch of the intended sending of a second set of cars along the freight track. While the switch and standing cars were widely separated the view between them was unobstructed so that Voelker and the switching crew could each have ascertained the movements of the other with little effort. It was important therefore to know whether it was Voelker's duty to take the precaution necessary

to avoid injury from an exposed position between the cars and the movement of other cars, or whether it was the duty of the switching crew to take this precaution. While the evidence respecting the practice in switching cars and the duties to be performed by those engaged therein was conflicting, that produced by defendant, including the testimony of the yard master and of the foreman of the switching crew under whom Voelker was employed, tended to show that the practice long established, generally followed and effective during Voelker's employment, was that this duty rested upon the car coupler and not upon the switching crew. The custom is stated by one of the witnesses in this manner:

"Where the cars are kicked onto a track and a man rides down the first cut, and goes into the field, and other cars are kicked in on the same track, it is not customary or a usual thing for the men who are kicking the cars in to wait before kicking in a second cut to see where the man is who rode the first cut down. It is not customary for persons kicking in cars in that way to hold up or refrain from kicking them in, after one set of cars is kicked in, until they can see the man in the front, unless they get a signal from him or something. The man who rides down the first string is called the fieldman, and he is understood to take care of himself, look out for himself. These were automatic couplers on these cars. The fieldman sets the couplers, so, if they come together, they will catch. When he goes in and finds he can't couple, and he understands other cars may come down the track, his duty is to step out—he don't need to give any signal—step out of the way. He would give no signal to the men who were kicking in the cars on the other end because it wouldn't be necessary; you couldn't stop the cars, kicking them in there; it don't make any difference for that coupling; he would let it go. It would be coupled up afterwards."

Another witness put it this way:

"Q. It wouldn't be customary to be looking for that (position of fieldman)?—A. No, sir; when we switch cars we always kick one cut in and the fieldman looks out for them, and keeps on kicking until you get the track filled up. Q. And then you would kick in cut after cut without looking to the fieldman at all?—A. Yes, sir. * * * Q. The fieldman, as I understand it, is supposed to look out for himself?—A. Yes, sir. Q. By the Court: Is there a difference between the action when a switchman or fieldman is in for the purpose of coupling up the cars?—A. If the fieldman aint got all the couplings made you get hold with your engine and couple them all up."

As applicable to this state of the evidence bearing upon the second charge of negligence, defendant requested the court to charge the jury as follows:

"If while Voelker was working in the yards it was the general and uniform custom to kick cars down to the fieldman, without giving him

any notice or warning, and Voelker continued in the service, such custom being practiced or acted on, he took the risks arising from this manner of kicking cars, and no recovery can be had because of injury to him caused thereby."

"If while Voelker was working in the yard it was the general and uniform custom to kick cars down to a fieldman, so called, without giving him any notice or warning, and Voelker was acting as fieldman, and cars were kicked down to him, without giving him notice or warning and he remained working in the yard while this custom or practice was observed, there can be no recovery for any injury done him because of the kicking of cars to him without giving notice or warning that it was to be done."

The court refused to so instruct the jury and gave no other instruction upon the subject. We regard these requests as substantially the same and think one of them should have been granted. The rejection of both was error. Each is in terms carefully confined to the charge of negligence in kicking or sending down the second set of cars, and each requires that the custom should have been general and uniform and that Voelker should have continued in the service while the custom was being observed. If it was general and uniform and was observed during his continuance in the service, it was manifestly within not merely his means of knowledge but his actual knowledge. He was an experienced railroad employee and was familiar with this branch of that service, having been in defendant's employ as a brakeman and switchman for a period of eight years. He therefore understood the dangers incident to the observance of such a custom. There can be no claim under the evidence that the injury was wilfully or wantonly inflicted. Nor was the custom an unreasonable one. Whether or not there was occasion to go between the cars and thus assume a position of exposure to injury from the movement of other cars would be known to the fieldman but not to the switching crew. His position would also enable him to judge of the character and probable duration of the exposure better than could be done by others. He would be primarily in a place of safety, would know that the work in which he was engaged was in a larger sense that of moving cars and making up trains, and being in control of his movements would not assume a position of danger without some volition of his own. If in the presence and during the observance of a general and uniform custom of the character stated Voelker continued in the service of defendant, he assumed the risk of injury arising from its observance.

The judgment is reversed, with a direction to grant a new trial.

O

United States Circuit Court.

SOUTHERN DISTRICT, CENTRAL DIVISION OF IOWA.

WHITE *v.* CHICAGO GREAT WESTERN RAILWAY COMPANY. } Action at law.

Hon. SMITH MCPHERSON, judge, presiding.
Baily & Ballreich and *H. H. Stipp*, attorneys for plaintiff.
Wright, Hewitt & Wright, attorneys for defendant.

PLAINTIFF'S BILL OF EXCEPTIONS.

Be it remembered that on this the 20th day of November, 1901, this cause came on for trial before the court and a jury duly impaneled, when the following proceedings were had, to wit:

The plaintiff, F. W. White, being produced and sworn, testified as follows:

I am the plaintiff in this cause. I was some months over twenty-four years old in August, 1900. At that time and for about eighteen months prior thereto I was in the employment of the defendant in the capacity of brakeman. About twelve months of that time I was employed as passenger brakeman, and during the latter three or four months I was freight brakeman, running on division between Oelwein and Des Moines, Iowa. Prior to this time I had worked in one of the offices of defendant company at Des Moines, Iowa, in the capacity of caller. In this capacity it was my duty to call the men to go out on their runs. The last month that I worked for defendant I had a regular run on freight; just prior to that I was on the extra list.

On the 4th day of August, 1900, I was on my run from Oelwein, Iowa, to Des Moines, Iowa. When we reached Marshalltown I lost my thumb and forefinger of my right hand in an attempt to make a coupling. We started from Oelwein with a double header—that is, with two engines. The front engine was a mogul which the company use in pulling freight trains. The second engine was a standard, or one used by the company in pulling passenger trains. We only had

double headers occasionally. The mogul engine was placed in front because it had the largest air tank and thus could better handle the train with the air brakes in that position. The mogul was attached to the front end of the passenger engine and the latter was coupled on to the train. I don't remember who coupled the two engines together; I may have done it; I was head brakeman. On the tender of the front engine there was an automatic coupler, but on the tender of the rear or passenger engine there was an old double pocket link and pin coupler, one pocket above the other. The car to which the passenger engine was coupled was equipped with a Janney type of coupler—that is, an automatic coupler. The automatic couplers all work one with the other and it is not necessary to go in between the cars to couple or uncouple them; they work automatically.

In order to couple the passenger engine to the car a link and pin had to be used, and it was necessary to go in between the car and tender and guide the link and drop the pin with one's hands. When we reached Marshalltown the conductor instructed me to take the passenger engine and set out the head car and pick up another car and put it in the train, while he took the front engine down to get water. I set out the car, let the engine in on a switch within a short distance of the car I was to pick up, when it stopped. I then examined the couplers. The car was equipped with an automatic coupler.

The link was in the lower pocket of the coupler on the tender. I was on the right side of the engine—that is, the engineer's side—which is the usual side to work on, so you can give signals to the engineer. I signaled the engine back. It came as fast as a man would ordinarily walk. I stepped in between the tender and the car, took hold of the link to guide it into the slot made to receive it in the knuckle of the automatic coupler. The cars came together and caught my hand. I should say that the way I attempted to make the coupling was the usual, ordinary, and general way to make that kind of a coupling, under all the circumstances. It was necessary to go between the cars and use my hands.

In order to couple a link and pin coupler to an automatic coupler, link and pin must be used. The tender on the freight engines of the defendant company were equipped with automatic couplers as well as some of the passenger tenders. I knew that the tender of the passenger engines were being changed to automatics when they went into the shop for repairs. I have observed the equipment of the tender on other roads and would say that at the time I was injured one-half to two-thirds of said tenders were equipped with automatic couplers of the Janney type. All the freight cars were so equipped. An automatic coupler works as well on a tender as on a car.

Exhibit B is a picture of a link and pin coupler on the rear of a tender, and it is just like the coupler that was on the tender I attempted

to couple when I was injured. The projection above, marked "a," is called a crane and is used as a buffer in passenger service. In freight service this crane is removed because it is in the way. In the picture it is raised up ready to be taken off. In passenger service it is let down horizontal or at right angles to the coupler.

Exhibit C is a picture of an automatic coupler on a car.

Exhibit D is an automatic coupler on the rear of a tender. Line "a" points to the pin which is used when a link coupling is to be made. Line "b" points to the slot in the knuckle which receives the link when such a coupling is to be made. When the automatic couplers are used together no link and pin are used. One or both of the knuckles are open and when the cars come together they couple or lock by impact.

Exhibit G is a full-sized coupler of this type. (It is on a trestle before the jury, and is like the couplers shown in pictures Exhibit D and E. They are sometimes called the Janney type.)

EVIDENCE ON CROSS-EXAMINATION.

Before I entered the service of the company as freight brakeman I was passenger brakeman on defendant road for twelve months; before that I was caller. My duties as caller took me to the homes of the train men to call them to go out, and sometimes in the company's yard in Des Moines. While caller I have gone over to the company's round-house; this would take me through the yards. During this time I saw the train men switching, and thus by observation learned the signals to be given to the engineer.

I also saw them make couplings between cars having automatic couplers and tenders that had link and pin couplers, and tenders that had automatic couplers. I saw them make couplings both ways. I knew that a man had to go between the cars and take hold of the link where link had to be used. I had seen it done and was familiar with the way it was done. I knew that it was dangerous. I knew that one would not have to go between the cars when both were equipped with automatic couplers.

I never worked as brakeman for any other company.

When I commenced as passenger brakeman all the passenger engines still had the old link and pin couplers. I would go with the engine and couple it to the train every day. To do this I had to use link and pin, because the coaches were equipped with the Miller hook coupler, and they can only be coupled to a tender having a pocket coupler by means of a link and pin.

A Miller hook is a bar of iron with a hook at the end projecting from under the platform. They couple when the hooks pass each other in this way. (Witness using his hands to illustrate by bending

his fingers as a hook.) On the outside of the front end of the Miller coupler opposite the hook there is a slot for a link, and vertically through the head is a hole for a pin so a link and pin coupling can be made. The link does not go into the slot like it does into the pocket of a link and pin coupler. The slot in the Miller coupler is not like the slot in a Janney coupler. The couplers are not the same; they are two different types. But a link and pin must be used with both when they are to be coupled to a pocket or link and pin coupler.

In making these couplings to the Miller hook I put the link in the slot of the Miller and guided it with my hands into the coupler on the tender. This was necessary because of the crane used above the coupler on the tenders in passenger service. (To all the questions eliciting this testimony respecting the Miller hook and its workings the plaintiff at the time objected, upon the grounds that they were incompetent, irrelevant, and immaterial and not proper cross-examination, the plaintiff not having gone into the question of the Miller hook and its uses. The court overruled the objection and gave the plaintiff an exception.)

In making a coupling from a Janney to a link and pin I would not say that you should always put the link in the Janney. The danger does arise, because the slot is open on one side and the link may pass.

In an ordinary link and pin drawbar the mouth of the pocket is wider, and you do not have to hold the link so long; but you can get your fingers caught in them, too, because the link does not prevent them from coming together. It takes more care to guide link into the Janney slot, because it is not so wide and is open on one side, which necessitates one to hold the link longer. This makes it more dangerous to couple a link and pin coupler to a Janney than to couple one link and pin to another. There is a difference in making a coupling between a tender equipped with a link and pin coupler to a car with a Janney and the same tender to a Miller hook. When you are coupling to a Miller hook the tender always has a crane or buffer above the coupler, but you handle the link substantially the same. I never figured that it was safer to put the link into the Janney and let the engine back up. I think one should use his own judgment. There is no rule about this. It is customary to put the link into the moving car and guide it into the coupler of the car that is standing still. I don't know whether it is safer or not to always put the link into the Janney. The universal way is to make it where the link is found. That is the way I always made it.

It was my duty as head brakeman to couple on the engine when starting out, but I don't know who did it this time. I did couple the two engines together. The front tender had an automatic or Janney coupler, but the front end of the rear engine did not have an automatic coupler. I may have coupled this passenger engine before during my service. I have seen these engines before and have made such

a coupling. I can not explain in detail just how or why my fingers got caught. I don't know just how the link passed. It is more dangerous to make a coupling between cars equipped with Miller hook and Janney coupler than between cars equipped with link and pin couplers. It is more dangerous to make a coupling between a Janney and a link and pin than it is between two link and pin couplers. You can not couple the Janney to the Miller hook without link and pin. They do not work together. I kept the link in the tender, because the pin in the tender holding it was long, like Exhibit A (Exhibit A was identified and introduced in evidence. The evidence showed that it was about 18 inches long and weighed about 18 pounds), and would not stand up. It was in the moving car. I cocked the pin in the still car and guided link from moving car. The Miller hook was only in use on the passenger cars. I never saw them on tenders or on freight cars.

REDIRECT EXAMINATION.

The passenger engines were only used in freight service by me on the average of once a week, and then it was only when we had a double header. The appearance of these with the old link and pin coupler was growing less and less.

I only coupled the passenger engine to the coach when I was passenger brakeman once a day, and that was in the yard, when we had plenty of time. The crane over the coupler, as shown in Exhibit B, was always down and it matched a buffer on the platform of the coach, which prevented the couplers from jamming together unless the engine came back with considerable force.

Plaintiff introduced in evidence Exhibits B, C, and D, and also Exhibit F, being a record from the office of the railway commissioners of Iowa, showing the state of the equipment of locomotives and tenders in the State of Iowa at the time plaintiff was injured. This record being made up from reports of the several roads to the commissioners and at their request. From the record plaintiff introduced reports of the following leading roads:

	Total number of locomotives and tenders.	Total number equipped with automatic couplers.
Wabash	437	407
M. and St. P	78	52
C., St. P., M. and O	275	262
C. and N. W	1,060	863
C., M. and St. P	837	664
C., B. and Q	603	584
C., R. I. and P	572	272
	3,862	3,104

Mr. Alexander Dallas, on behalf of plaintiff, was sworn and testified as follows:

"I am master mechanic of the Des Moines Northern Railway Company and have been for several years. I have been in railroad work for thirty years. As master mechanic I have charge of the engines and tenders and the equipment of them. The automatic coupler before me, being Exhibit G, is the Janney or Master Car Builders' type, and it is the type of automatic couplers in use. They work just as well on a tender as they do on a car. I can not say the extent of the equipment of tenders in Iowa with these couplers at the time of plaintiff's injury. I think less than half. A tender is a car which is attached to the engine with a bar coupling and chains. It has rubber hose attached to convey water to engine; also air hose. It can be detached by uncoupling the hose and the chain and the bar."

CROSS-EXAMINATION.

"A tender is necessary to the engine. It could not run long without it as it furnishes the coal and water. The tender is fastened to the engine with an iron bar and chains; also by rubber hose."

Mr. S. J. Nelson, on behalf of the plaintiff, was sworn and testified as follows:

"I am a railroad man and have been in the capacity of brakeman and conductor on freight trains for fourteen years. I have examined the automatic coupler before me, being Exhibit G, and is of the general type in use. They work just as well on tenders as on cars. I should say that they have been in use several years, and at the time of plaintiff's injury I should say that about one-half of the tenders in Iowa were equipped with them."

Plaintiff offered in evidence sections 2079, 2080, and 2083 of the Code of Iowa and chapters 50 and 51 of the Laws of the Twenty-seventh General Assembly of Iowa. The court stated that there was no use to put them in evidence for the reason that the court would take judicial notice of all laws bearing on the subject.

There was other and further testimony and exhibits introduced on behalf of plaintiff, but it is not necessary for this bill of exceptions to extend the testimony further nor to set out the other exhibits.

At the conclusion of the testimony on behalf of the plaintiff, defendant interposed the following motion:

DEFENDANT'S MOTION FOR A VERDICT.

The defendant, at the close of plaintiff's testimony, moves the court to instruct the jury to find for the defendant, because—

1. The evidence fails to show any negligence on the part of the defendant.

2. The statute of Iowa in reference to automatic couplers upon cars has no application to automatic devices upon engines and tenders, and

therefore there was no negligence upon the part of defendant in its failure to have automatic devices upon the tender and the engine.

3. The evidence shows that the plaintiff was guilty of contributory negligence.

4. The evidence shows that plaintiff was thoroughly familiar with the devices in use by the defendant company; that he knew the manner in which couplings were made, and he knew the peculiar device that was used on tenders and cars at the time of the accident in question, and he knew all the dangers incident to making a coupling of that character, and with such knowledge and means of knowledge he remained in the employ of the company without protest and without promise of change, and he has waived any right to claim any damage by reason of any injury resulting to him by the use of such devices, and he assumed all risk in connection with the use thereof.

5. The evidence shows without conflict that the coupling of a tender with an ordinary link and pin coupling apparatus to a car equipped with a different kind of coupling apparatus was one of the incidents of the service, and one of the perils he assumed when he entered and remained in the employ of the company.

6. There was no negligence as to him in the use of devices that were in use at the time of the accident in question.

7. It is not shown that the tender in question was being used wholly in connection with domestic commerce, and therefore under no view of the law could the statute of the State of Iowa apply.

The court sustained the motion on grounds 1, 2, 3, 4, 5, and 6 stated therein, and directed the jury to return a verdict for the defendant, which was done.

To all of which plaintiff asked and was granted an exception to the sustaining of the motion on each of the several grounds, and plaintiff asked and was granted an exception to the directed verdict and was given ninety days in which to settle and file his bill of exceptions.

COURT'S CERTIFCATE.

And now on this day the plaintiff presents the foregoing bill of exceptions and asks that the same be allowed, signed, filed, and made a part of the record in said cause which is done accordingly and so ordered this 9th day of December, 1901.

(Signed) SMITH McPHERSON,
U. S. Judge, Southern District of Iowa.

(Indorsed:) U. S. circuit court. F. W. White, plaintiff, *vs.* Chicago Great Western Railway Co., defendant. Plaintiff's bill of exceptions. Filed December 11, 1901. E. R. Mason, clerk. Baily, Ballreich & Stepp, attorneys for plaintiff.

A true copy.

Attest:

EDWARD R. MASON,
Clerk.

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DEFECTIVE SAFETY APPLIANCES.

DECISION OF UNITED STATES CIRCUIT COURT.

WINKLER v. PHILADELPHIA & R. RY. CO.

(Superior Court of Delaware. Newcastle. September term, 1901.)

[Reprinted from the Atlantic Reporter, vol. 53, p. 90, by permission of the West Publishing Company.]

MASTER AND SERVANT—RAILROADS—NEGLIGENCE—AUTOMATIC COUPLERS—FAILURE TO FURNISH—INTERSTATE COMMERCE.

1. The safety appliance act of Congress of March 2, 1893, as amended April 1, 1896, provides that it shall be unlawful for any carrier to haul on its lines any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without men going between the cars; and section 8 provides that any employe injured by any car in use contrary to the act shall not be deemed to have assumed the risk. *Held*, That in an action for injuries received while coupling a tender to a car, the claim being that the tender was not properly equipped under the act, the burden is on plaintiff to show that the cars in question were being used in moving interstate commerce and were not properly equipped.
2. If the car being moved had come from a point out of the State it would be moving interstate commerce.
3. Though the car to which the tender was being coupled was not used in interstate traffic, the case was within the statute if the removal of such car was a necessary step in moving an interstate car.
4. The safety-appliance act of Congress of March 2, 1893, as amended April 1, 1896, provides (section 2) that it shall be unlawful for any carrier to haul on its lines any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without men going between the cars; and section 8 provides that any employee injured by any car in use contrary to the act shall not be deemed to have assumed the risk. *Held*, that a locomotive tender is a car within the act.
5. In an action for an injury received while coupling a car to a tender the negligence relied on was the necessity of making the coupling with a "bull-nose" coupler on the tender. *Held*, that if the tender at the time of accident was equipped with automatic couplers, but that it was so connected with the "bull-nose" coupler that the coupling with other cars was not made automatically by impact, but it was necessary for men to go between the ends of the cars to couple and uncouple, then the coupling did not comply with the act of Congress of March 2, 1893, as amended April 1, 1896, requiring safety couplings, and was unlawful.
6. If, however, in using such unlawful coupler, the plaintiff contributed to the accident by his own carelessness, he could not recover, notwithstanding the fact that the coupling was unlawful.

7. On a verdict for a servant in an action against the master for injuries the jury should award such sum as will reasonably compensate him for his injuries, including therein his loss of time and wages, his pain and suffering in the past and such as may come in the future, resulting from the accident, and also for such pecuniary loss as, from the evidence, the jury may believe will arise from his diminished ability to earn a living in the future.

Action by George C. Winkler against the Philadelphia and Reading Railway Company. Verdict for plaintiff.

Argued before Lore, C. J., and Grubb and Pennewill, J. J.

Victor B. Woolley and *Wm. S. Hilles*, for plaintiff. *Levi C. Bird* and *Andrew E. Sanborn*, for defendant.

LORE, C. J. (charging jury). George E. Winkler, the plaintiff in this action, claims that on the 19th day of February, 1901, he was in the employ of the Philadelphia and Reading Railway Company, the defendant, as head brakeman of the shifting crew, which was using shifting engine No. 1242 and its tender in moving and delivering interstate commerce cars at the siding on the south side of this city, the defendant then and there being a common carrier of passengers and freight; that while coupling the tender to the next car, using a "bull-nose" coupler, without fault on his part his right hand was caught between the couplers, resulting in the loss of three fingers, and otherwise crushing and injuring his hand; that the "bull-nose" coupling on the tender was dangerous and unlawful; that he was inexperienced in the business of a brakeman, and was not warned or instructed by the defendant as to the risk thereof; that his injuries were caused by the defendant's negligence. The defendant, on the other hand, claims that the engine and tender were not engaged in moving interstate commerce at the time of the accident, but merely in moving local traffic; that the "bull-nose" used on the tender at that time was necessary in order to safely move cars around sharp curves in the Diamond State Steel Yard, where the automatic couplers would not work, and was a reasonably safe and proper appliance for such purpose; that moreover the tender and cars were equipped with automatic couplers as required by law; that the plaintiff sought work as a competent brakeman, and also actually received instruction as to the risk of his employment, which risks and dangers were also open and known to the plaintiff; that his injuries were the result of his own carelessness.

It is conceded that the relation of master and servant existed between the plaintiff and the defendant at the time of the accident. We are asked to instruct you as to certain duties and obligations growing out of that relation. It is the duty of the master to provide for his employees a reasonably safe place in which to work, and reasonably safe tools and appliances with which to work, and also to keep them in a reasonably safe condition. The place, tools, and machinery need not

be of the best, nor of the latest pattern, nor of the most improved kind, but must be reasonably safe and adapted to the purpose for which they are to be used. If the master fails to perform his duty, and injury results from such failure alone, he is liable. It is the duty of the master to make, promulgate, and enforce proper rules for the government of his business where it is so large or complicated as to make his supervision impracticable. It is the duty of the servant to obey such rules when reasonable and proper. Where the master knows that the servant is inexperienced, he may not presume that the servant appreciates and knows the risks of his employment. In such cases it is the duty of the master to warn the servant against risks known to the master, and which it is unreasonable to suppose the servant appreciates. Where, however, a person of apparent maturity and of average capacity solicits a particular kind of work, the master has a right, in the absence of information to the contrary, to assume that the applicant is qualified for the particular work applied for.

It is only where the master knows of the disqualification of the servant to safely encounter dangers known to the master, and presumably unknown to the servant, that the duty of cautioning and instructing the servant arises. (*Railroad Co.* v. *Miller*, 43 C. C. A., 436, 104 Fed., 124.) The servant assumes the dangers and hazards which are ordinarily incident to the service which he undertakes, and is presumed to have contracted with reference to them. Where the employment is dangerous he also assumes the risk he may incur from manifest peril. (*Stewart* v. *Railroad Co.*, 8 Houst., 450, 17 Atl., 639.) He also assumes the risk and dangers of devices and methods of work which are open and apparent and equally well known to the servant as to the master. (*Creswell* v. *Railroad Co.*, 2 Pennewill, 220, 43 Atl., 629; *Maul* v. *Railroad Co.*, 1 Pennewill, 561, 42 Atl., 980; *Huber* v. *Jackson & Sharp Co.*, 1 Marv., 374, 41 Atl., 92.) These are some of the general rules governing the relation of master and servant.

The assumption of risk, however, on the part of employees of railroad companies which are common carriers engaged in interstate commerce, has been modified by act of Congress known as the "Safety-appliance act," passed March 2, 1893, and amended April 1, 1896, which was in operation at the time of the accident. This act provides as follows:

"SEC. 2. That on and after the first day of January, 1898, it shall be unlawful for any common carrier to haul or permit to be hauled or used on its lines any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

"SEC. 8. That any employee of any such common carrier who may

be injured by any locomotive, car, or train in use contrary to the provisions of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train has been brought to his knowledge."

In this case it is claimed by the plaintiff that at the time of the accident he was engaged in moving interstate commerce for the defendant company, with a tender or car not equipped with couplers coupling automatically by impact, which could be uncoupled without the necessity of men going between the ends of the cars, but were being coupled by a swinging "bull-nose" and link, contrary to the act of Congress, and that his injuries resulted therefrom. To sustain this contention it is necessary for the plaintiff to show by a preponderance of the evidence: (1) That at the time of the accident he was engaged in moving cars then used in interstate traffic; (2) that at the time of the accident the cars then in use were not equipped with automatic couplers, as required by the act of Congress. The burden of proof is upon the plaintiff to show these facts.

First. If the tender and car were then in use in moving local traffic only from point to point within the limits of this State, they could not be engaged in interstate commerce. If, however, the car being moved had come from a point out of the State with freight to be here delivered, it would be moving interstate commerce. This would be so even though the car to which the tender was being coupled was not the car used in interstate traffic, if the removal of such car was a necessary step in getting at and moving said interstate car.

Second. Should you be satisfied that the tender was so engaged in moving interstate commerce, you must be further satisfied from the evidence that it was not equipped with automatic couplers. We may say to you that the tender of a locomotive engine engaged in interstate commerce is a car within the scope of the act of Congress, which uses the general terms "locomotive," "car," or "train." A tender is defined to be a car by Webster. The tender is not a locomotive engine or component part thereof, but is the small car carrying water and fuel for the engine, and to which the first passenger or freight car of the train is usually coupled. This interpretation comes not only within the language of the act of Congress, but is especially within its scope, which is to promote the safety of employees and travelers upon railroads. Should you find that the tender at the time of accident was equipped with automatic couplers, but that it was so connected with the "bull-nose" coupler that the coupling with other cars was not made automatically by impact, but so equipped that it made it necessary for men to go between the ends of the cars to couple and uncouple, then such coupling did not comply with the act of Congress, and was unlawful.

If at the time of the accident the defendant was using such a coupler, which was prohibited by the act of Congress, it was guilty of negligence per se; and if the injuries complained of resulted from such unlawful use alone, then the defendant would be liable. The law manifestly contemplates that the car shall be so equipped that the coupling shall actually be made automatically, and if not so equipped the plaintiff did not assume the risk arising therefrom, even though he continued in the employment of the company after such unlawful use of the cars had come to his knowledge. If, however, in using such unlawful coupler, the plaintiff contributed to the accident by his own carelessness, he can not recover, notwithstanding the fact that the coupling was unlawful. In such case he must take the consequence of his own contributory negligence. Should you find that at the time of the accident the defendant company was not engaged in moving interstate commerce, but only local commerce, we say to you that the act of Congress does not apply. In like manner it does not apply if the cars in use were actually equipped with automatic couplers, as contemplated by the act, and in compliance with its terms. Should you find from the evidence the state of facts to be such that the act of Congress does not apply to the case under the foregoing instructions, you should not consider the provisions of this act in making up your verdict, but be governed by the general rules relative to master and servant.

This action is based upon the negligence of the defendant company. Such negligence is never presumed, but must be proved, to entitle the plaintiff to a verdict. The burden of proving such negligence is upon the plaintiff. It is the duty of the servant, as well as of the master, to exercise care and prudence in all cases commensurate with the risk or danger of the employment. Therefore if the plaintiff contributed to the accident by his own negligence he can not recover. Where contributory negligence is relied upon as a defense, however, the burden of proving such negligence is upon the defendant. If you find for the plaintiff, your verdict should be for such sum as in your judgment, from the testimony, will reasonably compensate him for his injuries, including therein his loss of time and wages, his pain and suffering in the past, and such as may come in the future, resulting from the accident, and also for such pecuniary loss as from the evidence the jury may believe will arise from his diminished ability to earn a living in the future.

Verdict for plaintiff.

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DEFECTIVE SAFETY APPLIANCES.

DECISION OF THE SUPREME COURT OF DELAWARE.

THE PHILADELPHIA AND READING RAILWAY COMPANY, DEFENDANT BELOW, PLAINTIFF IN ERROR, v. GEORGE E. WINKLER, PLAINTIFF BELOW, DEFENDANT IN ERROR.

(June 19, 1903.)

[Text of opinion reported in 4 Pennewill Delaware Reports, page 387, charge of court to jury, same vol., page 80.]

WRIT OF ERROR—PERSONAL INJURIES—ACT OF CONGRESS—CONSTITUTION—USING COUPLERS CONTRARY TO ACT—NEGLIGENCE PER SE—EVIDENCE—TENDER IS A CAR—REVERSIBLE ERROR—EVIDENCE; TO SUBMIT TO JURY, WHEN.

1. A judgment will not be reversed when it is clear that the errors assigned could not and did not prejudice the rights of the party against whom the ruling was made.
2. The act of Congress known as "the safety appliance act," approved March 2, 1893, and amended April 1, 1896, is not in conflict with the Constitution of the United States.
3. The *tender* used for carrying fuel and water for a locomotive is a *car* within the meaning and purview of the Federal safety appliance act.
4. There was sufficient evidence to warrant submission to the jury of the question whether the tender and car between which the plaintiff was injured were at the time engaged in interstate commerce, and the trial court properly instructed the jury that, if they so found, the act of Congress was applicable.
5. The true intent and meaning of the act of Congress is not merely that cars used in moving interstate traffic shall be equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars, but also that such couplers shall be in condition to be used automatically while such cars are so engaged; and using a "bull-nose coupler" upon a locomotive tender which will not permit coupling the tender with other cars automatically by impact, but makes it necessary for men to go between the ends of the cars to couple and uncouple, is not compliance with the act of Congress and is therefore unlawful. *Voelker v. C., M. & St. P. Ry. Co.*, 116 Fed. Rep., 867, cited and applied.
6. Under the requirement of the law that the coupling of cars shall actually be made automatically, the plaintiff did not assume the risk arising from the use by defendant of a coupler on an engine tender not working automatically with the coupler of another car, even though he continued in the employment of the defendant company after such unlawful use of the cars had come to his knowledge.

Nicholson, Chancellor, and Spruance and Boyce, J. J., sitting.

Andrew E. Sanborn for plaintiff in error. *William S. Hilles* for defendant in error.

Supreme court, January term, 1903. Writ of error to the superior court in and for Newcastle County.

The action brought below was for damages for personal injuries to the plaintiff, claimed to have been sustained under the following circumstances, viz: That on the 19th day of February, 1901, he was in the employ of the Philadelphia and Reading Railway Company, the defendant, as head brakeman of the shifting crew which was using shifting engine No. 1242 and its tender in moving and delivering interstate commerce cars at the siding on the south side of the city of Wilmington, the defendant then and there being a common carrier of passengers and freight; that while coupling the tender to the next car, using a "bull-nose" coupler, without fault on his part, his right hand was caught between the couplers, resulting in the loss of three fingers, and otherwise crushing and injuring his hand; that the "bull-nose" coupling on the tender was dangerous and unlawful; that he was inexperienced in the business of a brakeman, and was not warned or instructed by the defendant as to the risk thereof; that his injuries were caused by the defendant's negligence.

The defendant, on the other hand, claimed that the engine and tender were not engaged in moving interstate commerce at the time of the accident, but merely in moving local traffic; that the "bull-nose" used on the tender at that time was necessary in order to safely move cars around sharp curves in the Diamond State Steel Company's yard, where the automatic couplers would not work, and was a reasonably safe and proper appliance for such purpose; that, moreover, the tender and cars were equipped with automatic couplers, as required by law; that the plaintiff sought work as a competent brakeman, and also actually received instructions as to the risks of his employment, which risks and dangers were also open and known to the plaintiff. That the latter's injuries were the result of his own carelessness.

It was conceded that the relation of master and servant existed between the plaintiff and the defendant at the time of the accident.

The points relied upon by plaintiff in error in the argument in the Supreme Court were as follows:

First. That the court erred in submitting to the jury the question as to whether the act of Congress passed March 2, 1893, requiring the use of automatic couplers on cars used in interstate commerce applied to the facts proved in this case.

Second. That the court below erred in allowing the following question to be answered:

Q. "Where did the cars come from that were hauled generally on that road by that engine and tender?"

And in not confining the question to the particular car or cars that were being shifted at the time of the accident.

Third. That section 8 of the act of Congress known as the "safety-appliance act" would, if applied to the facts proved by the evidence in this case, be in violation of the Constitution of the United States.

Fourth. That the court erred in charging the jury "that the defendant would be engaged in moving interstate commerce even though the car to which the tender was coupled was not the car used in interstate traffic, if the removal of such car was a necessary step in getting at and moving said interstate car."

Fifth. That the court erred in not charging the jury, as requested by the defendant, that, assuming that the act of Congress applies to the case, the defendant was justified in making use of the "bull-nose" in connection with the automatic couplers, where, by reason of sharp curves in the Diamond State Steel Company's yard, the automatic couplers could not possibly be used without such or a similar device.

Sixth. That the court should have instructed the jury, as requested by the defendant, that if the plaintiff, voluntarily, knowingly, without objection and without special orders from the defendant, used the said "bull-nose," which was easily detachable from the automatic coupling, at the time of the accident in a place where it was not necessary, by reason of sharp curves in the track, to use the same, he assumed whatever risk was thereby occasioned.

Seventh. That the court erred in not charging the jury, as requested by the defendant, that if the plaintiff, knowing the "bull-nose" was being used of necessity on the sharp curves in the yard of the Diamond State Steel Company, voluntarily made use of the same, without objection on his part and without being especially ordered to use it on the occasion of the accident, the defendant would not be liable.

Ninth. That the court erred in not charging the jury, as requested by the defendant, that the alleged danger was patent and obvious.

Tenth. That the court erred in not charging the jury, as requested by defendant, that if the master and servant had equal knowledge, or equal means of knowledge, of the risk and danger connected with the devices in use at the time of the accident, the servant could not recover.

Eleventh. That the court erred in not giving a binding instruction to the jury, as prayed for by the defendant, that the defendant was not guilty of negligence.

Twelfth. That the court erred in not charging the jury, as requested by the defendant, that the plaintiff was guilty of contributory negligence.

Thirteenth. That the court erred in not charging the jury, as requested by defendant, that plaintiff was injured in consequence of an ordinary risk incident to the service in which he was engaged and could not therefore recover in this action.

BOYCE, J., delivering the opinion of the court:

We have carefully examined and considered the several assignments of error, the record, and the briefs of counsel in this case, in connection with the rulings of the court below upon the admission and rejection of testimony, and likewise in connection with the charge of the court to the jury, and we do not find any reversible error in the trial below. It is an established rule in this court that it will not reverse a judgment when it is clear that the errors assigned could not and did not prejudice the rights of the party against whom the ruling was made. *Creswell* v. *W. & N. R. R. Co.*, 2 Pennewill, 210.

The court below did not err in declining to charge that the act of Congress, known as "the safety appliance act," approved March 2, 1893, and amended April 1, 1896, is in violation of the Constitution of the United States and unconstitutional and void, or that the statute did not apply to this case, because, as it is alleged, there was no evidence that the engine and tender of the defendant company were, at the time of the accident, engaged in moving cars then used in interstate traffic; and rightfully held that the *tender* used for carrying fuel and water for a locomotive is a *car* within the meaning and purview of the act. The statute provides as follows:

"SEC. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its lines any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the end of the cars."

"SEC. 8. That any employee of any such common carrier who may be injured by any locomotive, car or train in use contrary to the provision of this Act, shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car or train had been brought to his knowledge."

It was claimed by the plaintiff that at the time of the accident he was engaged in moving interstate traffic for the defendant company with an engine and tender not equipped according to the statutory requirement. The burden of proof was upon him to show this.

The preliminary question for the court below, as well as for this court, is not whether there was literally no evidence, but whether there was any evidence upon which the jury could properly proceed to find that at the time of the accident the said tender and car were engaged in moving interstate traffic. (*Creswell* v. *W. & N. R. R. Co.*, 2 Pennewill, 210.) We think there was sufficient relevant testimony in this case to warrant the court in submitting to the jury for their determination the question whether the tender and car between which the plaintiff was injured were, at the time of the accident, thus

engaged; and the instruction by the court to the jury to the effect that, if they so found the act of Congress would be applicable, was proper. The true intent and meaning of the statute is not merely that the cars, etc., used in moving interstate traffic shall be equipped with automatic couplers of the description therein mentioned, but also that such couplers shall be in such condition as to be used automatically while such cars are so engaged.

In the case of *Voelker* v. *Chicago, M. and St. P. Ry. Co.*, 116 Fed., 867, the court said: "The statutory requirement with respect to equipping cars with automatic couplers was enacted in order to protect railway employees, as far as possible, from the risks incurred when engaged in coupling and uncoupling cars. If a railway uses in its business cars which do not conform to the statutory requirements, either because they never were equipped with automatic couplers, or because the company, through negligence, has permitted the couplers, originally sufficient, to become worn-out and inoperative, then the company is certainly not performing the duty and obligation imposed upon it by the statute, and is clearly, therefore, chargeable with negligence in thus using an improperly equipped car." The true intent and meaning of the act of Congress is not merely that cars, etc., used in moving interstate traffic shall be equipped with automatic couplers of the description therein mentioned, but also that such couplers should be in such condition as to be used automatically while such cars are so engaged.

Applying to this case the principle thus announced, we are of the opinion that the court below correctly charged that "Should you find that the tender at the time of the accident was equipped with automatic couplers, but that it was so connected with the bull-nose coupler that the coupling with other cars was not made automatically by impact, but so equipped that it made it necessary for men to go between the ends of the cars to couple and uncouple, then such coupling did not comply with the act of Congress and was unlawful."

"If, at the time of the accident, the defendant was using such coupler, which was prohibited by the act of Congress, it was guilty of negligence *per se;* and if the injuries complained of resulted from such unlawful use alone, then the defendant would be liable. The law manifestly contemplates that the car shall be so equipped that the coupling shall actually be made automatically, and if not so equipped the plaintiff did not assume the risk arising therefrom, even though he continued in the employment of the company after such unlawful use of the cars had come to his knowledge."

We are of the opinion that the judgment of the court below should be affirmed.

Judgment affirmed.

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A question which the Federal Supreme Court can review on writ of error to a State court does not arise under the act of March 2, 1893, requiring interstate carriers to equip their cars with automatic couplings, where no right under such act, or dependent upon its construction, was specially set up or claimed, and denied by the State court. *Ry. Co.* v. *Carson* (194 U. S., 136) 29

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If a railroad company engaged in interstate commerce permits to be hauled on its road any cars not equipped as the Federal statutes provides, even though they belong to other companies, such railroad company offends against the provisions of the statute. *Crawford* v. *Railroad Company* (10 Amer. Neg. Rep., 166) 44

The Federal safety-appliance act is intended to protect brakemen against the dangers of their work, so far as it can, and it applies to interstate-commerce cars which are being made up in the yard to start out on the road as well as to such cars when they are actually moving along between the States. *Crawford* v. *Railroad Company* (10 Amer. Neg. Rep., 166) 44

An extension of time procured from the Interstate Commerce Commission by railroad companies for placing self-couplers upon freight cars merely relieves the companies from the penalty provided in the safety-appliance act, but does not relieve them from the legal liability to employees for failure to provide suitable appliances in general use. *Greenlee* v. *Ry. Co.* (122 N. C., 977) 76

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Vacant cars in yards, on side tracks, in repair shops, or in trains which are not loaded with or in use to move articles of interstate commerce, do not fall within the terms or meaning of the act of March 2, 1893. *Johnson* v. *Southern Pac. Co.* (117 Fed., 462) 88

The tender of a locomotive is not a car within the terms of the act of March 2, 1893. *Larabee* v. *Railroad Co.* (182 Mass., 348) 101

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Though an employee, in an action for injury from defective car coupling, does not, by his argument or otherwise, indicate that he is relying on the act of March 2, 1893, relating to automatic couplers, the court may and should instruct as to his rights thereunder. *Voelker* v. *Ry. Co.* (116 Fed., 867) 136

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Section 2 of the Federal safety-appliance act calls for couplers which dispense with the necessity of men going between the ends of the cars, whether engaged in the act of coupling or in that of uncoupling. *Ry. Co.* v. *Voelker* (129 Fed., 522) 148

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A switchman engaged in handling a freight car having a defective coupler, on a track which is principally used for handling freight trains, though sometimes cars are brought thereon in need of repairs, does not, in the presence of section 8 of the Federal safety-appliance act, assume the risk arising from the defect in the coupler, when he is not engaged in moving the car as one in bad order with a view to its isolation or repair. *Ry. Co.* v. *Voelker* (129 Fed., 522). 149

Under the safety-appliance act of March 2, 1893, as amended April 1, 1896, in an action for injuries received while coupling a tender to a car, the claim being that the tender was not properly equipped, the burden is on the plaintiff to show that the cars in question were being used in moving interstate commerce and were not properly equipped. *Winkler v. Ry. Co.* (53 Atl., 90).... 167

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Failure to furnish automatic car couplers in common use for freight cars is negligence *per se*, which renders a railroad company liable to an employee for injuries received in attempting to couple cars having skeleton drawheads of unequal height. *Troxley* v. *Ry. Co.* (124 N. C., 191) 122

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Failure to furnish automatic car couplers in common use for freight cars is negligence *per se*, which renders a railroad company liable to an employee for injuries received in attempting to couple cars having skeleton drawheads of unequal height. *Troxler* v. *Ry. Co.* (124 N. C., 191) 122

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AUTOMATIC COUPLERS AND POWER BRAKES.

Office Supreme Court U.
FILED
OCT 26 1904
JAMES H. McKENNEY,
Clerk

HEARING

BEFORE THE

COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE

OF

THE HOUSE OF REPRESENTATIVES

IN RELATION TO

THE BILL FOR THE PROTECTION OF TRAINMEN AND OTHER RAILROAD EMPLOYÉS IN HANDLING LOCOMOTIVE ENGINES, FREIGHT TRAINS, AND FREIGHT CARS ENGAGED IN INTERSTATE COMMERCE; PROVIDING FOR THE ADOPTION AND USE OF A UNIFORM STANDARD AUTOMATIC CAR COUPLER, AND REGULATING THE OPERATION AND CONTROL OF FREIGHT TRAINS USED IN INTERSTATE COMMERCE, AND PROVIDING FOR THE GREATER SAFETY OF RAILROAD EMPLOYÉS, AND FOR OTHER PURPOSES; AND TO PROMOTE THE SAFETY OF EMPLOYÉS AND TRAVELERS BY COMPELLING COMMON CARRIERS ENGAGED IN INTERSTATE COMMERCE TO EQUIP THEIR CARS WITH AUTOMATIC COUPLERS AND CONTINUOUS BRAKES AND THEIR LOCOMOTIVES WITH DRIVING-WHEEL BRAKES.

Nos. 82[illegible], O. T. 1904,

Johnson v. S. P. Ry

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1892.

PROTECTION OF TRAINMEN AND OTHER RAILROAD EMPLOYEES, ETC.

INTERSTATE COMMERCE COMMITTEE,
February 18, 1892.

(The first part of Mr. Haines's argument was not reported.)

Mr. H. S. HAINES, president of the American Railway Association:

GENTLEMEN: It is not for me to deliver you a lecture on constitutional law. I am here to treat the question practically, and, as I hope, to throw some light on it that will aid you in your consideration of these several bills. The moral that I want to draw—I may call it a moral, for whatever sanction there is for Congressional legislation on this subject is a moral sanction—is to protect the lives and the limbs of the railroad employees. Now, the officials of the Railroad Employees' Association are here; they will address you on this subject; they will, I think, tell you, as I have heard them tell others, that all they ask in this world is that it shall be safe for them to go on in the ordinary conduct of their business. They will call your attention to statistics that have been gathered on this subject by the Interstate Commerce Commission which will show that during the last year there were three or four hundred men killed in this coupling of cars, and seven thousand, I think, more or less seriously injured in limbs and bodies. This is a thing that has been before the minds of the managers of these railroad companies in all these years, and this is the result of the solicitous consideration that they have given to this matter. That result stands before you in those two models there.

Mr. STORER. If it is not only constitutional but feasible for Congress to compel the use of a certain kind of car-coupler for the benefit and safety of the employees, would, in your judgment as a railroad man, Congress have the same power to interfere and regulate the method of heating cars, so as to prevent passengers from being burned up?

Mr. HAINES. I should think what would be a good reason in one case would be good in the other. In one case it is the protection of the lives and limbs of employees and in the other the protection of the public generally.

Now, I want to say that the test which you should apply to any proposed legislation is this: What you would be required to do in the interest of these people who are being injured. The test should be Are you required to lay down a law distinctly as to this or that particular pattern? Are you required to lay down a law as to this or that type? Now, I say no, and I think I can show your why. The man who manipulates that coupler has no interest whatever in the

type or locking device or any of the parts connected with it. He can handle it and know nothing about its internal construction, what its lines are, or anything of that kind. Why? Because all he requests is that he shall not be required to go in between the cars to do the coupling. If he can handle those cars in the performance of his duties so that he is not required to go in between them, that is all that concerns him. That is all he needs to know about it, and he will tell you that himself. How does that affect this question? I am going to show you.

All these interlocking devices are required to be manipulated in one and the self-same way, that is to say, a man comes alongside of the car and there is a rod which sticks out (unfortunately this model is too small to show you this)—I can show you better on the drawing—but there is a rod that stands off from the car connected with the locking device here [illustrating], and comes to the side of the car and is turned by a crank. When he turns it it unlocks, and when he lets it loose it locks; and so long as the rod is in the same place it is a very simple thing for the switchman to couple and uncouple the cars. That is all that concerns that man; if he will stand there he is safe, and it will perform all that would be expected of him to perform and all that we except the coupler to perform. Therefore, it seems to me that it is proper for me to impress that idea upon your mind, for in the interest of humanity you are not called on to prescribe a pattern—one pattern out of five or six thousand; you are not called on even to prescribe a pattern out of four or five thousand of this type. You are simply to decide what type should be used, if you think you should do anything.

I hope that I make this subject clear. If you gentlemen will take this pattern here it will show you how this rod comes out to the edge of the car.

Mr. Patterson. Has the Interstate Commerce Commission made any report in respect to this matter; that is, made any recommendation in respect to legislation in regard to it?

Mr. Haines. I was about to relate the history of attempted legislation up to this time, but before doing so I wanted to apply a measure, what I call a yardstick, to all these bills. Now, I say, therefore, in the interest of humanity, all that you are called on to require if you are called on to require anything, is that the man shall not be required to go in between the cars to couple them in the ordinary performance of his duties.

The Chairman. Mr. Haines, I do not wish to limit you at all, but I will ask you to make your points as quickly as possible, because of the large number of parties who wish to be heard.

Mr. Haines. It is a pretty broad subject and I am trying to get over it as rapidly as possible.

A Member. Your association represents how many miles?

Mr. Haines. One hundred and twenty-two thousand.

A Member. And how many miles are there in this country?

Mr. Haines. One hundred and seventy thousand miles in this country.

A Member. Then this association does not cover the whole mileage?

Mr. Haines. No, and no other body here covers anything like that much.

Mr. O'NEILL. There is a difference in cars, I believe, and do you know of any one invention to-day or number of inventions that could be applied to all cars alike—any single drawbar coupler that could be applied to all cars?

Mr. HAINES. I do not see why this would not. [Referring to a model on the table.] This type would do because the coupler has nothing to do with it when fastened on the car. This is attached to another device.

Mr. O'NEILL. This one opens from the side?

Mr. HAINES. All of them open from the side; all out of the four or five hundred.

Mr. O'NEILL. Are you aware, Mr. Haines, that more men were killed last year from falling from the tops of cars than from coupling cars?

Mr. HAINES. Undoubtedly.

Mr. O'NEILL. Have you thought of anything in connection with trying to save human life on that line?

Mr. HAINES. A great deal might be said which did not seem to be germane to this particular question of couplers, and so I did not speak in regard to it. And a great deal of what I had to say in regard to couplers you will find applicable to the question generally.

I am going to come now to the question of legislation. The Interstate Commerce Commission did take this matter up. They invited members of all the State commissions to come to a convention and they came together and appointed a committee on safety appliances and that committee on safety appliances was instructed to prepare and present a bill on this subject. That committee called a meeting and invited all those interested in this matter to attend. That committee meeting was held in New York, in the Chamber of Commerce rooms, and we were invited to be present. We came there and discussed this matter. The officials of the associations of railroad employees were there, and we had a very general and very pleasant discussion of this whole matter. There were no two sides to it. It was all on one side. These gentlemen were then to prepare a bill, and then they were to call us together again and show us their bill and see what we thought of it. They did not call us until day before yesterday. It seems there was a hearing before the Senate committee yesterday, and the day before that they called us hastily to appear before them. We came then. Much to my surprise they did not have *a* bill. They had *several* bills. It seemed to have been so many men with so many minds. After having discussed all this matter they were unable themselves to agree on any bill that they would present to Congress.

Now, the officials of the associations of railroad employees have had this subject up and their general idea seems to be that this is a matter that concerns them only in one respect, and that is that they shall be able to perform their duties with safety to themselves. That the selection of the device, the character of it, belongs to men who have to spend the money to put it on the car, and so long as they are protected in the discharge of their duties by not being required to go in between the cars to couple them it is not for them to say what should be the character of the device.

Now, the idea of some, if there is to be any legislation at all, seems to be that there shall be a commission appointed which shall pick out

some one coupler; that the expense of this commission in their elaborate investigation shall be paid for by an appropriation, and that that coupler, if it is a patented device, shall be paid for by the United States and made a present to us all. Now, if that was done the commission would probably select just such a coupler as that is. It would be no better coupler. But if we are allowed to go on the line we are going on, of a type, that would leave the matter of improvement open and would simply provide a rod to extend to the edge of the car so that the man need not go in between the cars.

The Massachusetts legislature attempted legislation of this kind in 1884. The legislature passed a law in which they gave to their commission the right to say that certain couplers and no others should be adopted. Well, they went all over this question. I could read you pages in this book, a Massachusetts committee report, showing how they went into this thing. They finally issued an order naming four or five couplers. Do you know, those four or five would not couple together. The different couplers would not couple. Now, that was a dead letter, and Massachusetts to-day is further behind in this question of the coupler than any other State, except, perhaps, New England generally.

In 1886 New York did the same thing. They passed a law on this subject which is just as dead as the one passed in Massachusetts.

Now, look at the commissions we have had on this thing. We have had the very best ability that the railroads could pay for in this country. We have had them at work on it for years. Their action has been supervised by the highest managing officers of the very best railroads in this country. They have spent hundreds and thousands of dollars and that is what they have come to. Now, I say you can not go back on what we have done. You can not expect us after we have nearly two hundred thousand cars equipped this way out of a million, and we are going on with this work at a rate that, I say, inside of four or five years will sweep the link and pin out of existence. You can not ask us to go back on this thing. If you are going to do anything, you have got to legalize what we have done. You must do that if anything.

Mr. LIND. Excuse me, but I came in a little late and I would like to ask if you do not represent the railroads in this matter?

Mr. HAINES. Yes, sir.

Mr. LIND. Do you advocate a special coupler?

Mr. HAINES. I advocate five hundred different kinds. Now, I say that this is the result of the management of 122,000 miles of railroad in this country. That this type, not that pattern or this, but this type, which embraces some five hundred couplers, is the type they have selected. Now, if you legalize anything you should not legalize this one or that one or any one of the dozen I have here, but you should legalize that type of a coupler.

Mr. COOMBS. If any legislation at all is to be passed, you would recommend a law to prohibit the use of any coupler that would not work from the side of the car.

Mr. HAINES. I am going to say what I would recommend. I want to say to you that any commission you appoint can not do anything more than what we have done.

Mr. O'NEILL. Of course, we know the commission is a very fair one, but we have not the advantage of all their work before us. Do

you not think that among all the patterns, thousands of which have expired, many of which are involved in different patents—in other words, that a commission could take out of the various inventions part of one and part of another, and from them get a perfect or as nearly a perfect coupler as possible, and have that recognized as the United States standard coupler?

Mr. HAINES. I think they could take part of one coupler and part of another and make a good coupler. That is just what we have done. We have taken part of one coupler and part of another and have decided that the couplers should be of this type—that is, the vertical hook type. Then we have prescribed certain lines that they must have so that they will couple together.

Mr. O'NEILL. I am under the impression that three-fourths of the lives lost and injuries sustained are caused by the absence of safety rails on the tops of cars and safety rails at the ends of cars. I believe that two-thirds of those men were injured because they have nothing on earth to catch hold of when they slip or the train moves. If there was a rail along the side of the car and at each end of the car, so that a man would have a chance to catch hold of it, there would not be anything like so many accidents. If there was a rail on the top of the car, so that when a man slips from the slanting footboard, he would have some chance to catch himself——

A MEMBER. I do not see just what that has to do with the question of coupling.

Mr. O'NEILL. It has this to do with couplers: When you are dealing with the question of couplers it is a mere matter of an invention to save human life, and if that can be accomplished by rails on the tops and sides of cars it is a matter to be considered in that connection.

Mr. HAINES. It would be no use having that if we did not want him to go between the cars. We will furnish a rod, to be operated from the side of the car, which any gentleman here could easily manipulate.

Mr. LIND. There are successful car couplers on some of the Western roads.

Mr. HAINES. There are two hundred thousand automatic couplers in use on freight cars. But there are a number of devices, and as long as they will couple together I do not think Congress ought to prescribe any particular one. As long as the man can stand at the side of the car I do not think it in the interest of humanity that you are called on to go further than to prescribe that the man shall be able to manipulate the coupler without going in between the cars.

Now, I have gotten to this point that I have shown you that no commission can do better than the commissions the railroads have had at work on this subject. If the air brake had been stopped by legislation at the time when Westinghouse first put it on the Pennsylvania Railroad, we would have been 'way behind the times. But we went further; and Mr. Westinghouse has got such an application of his idea, has so far perfected it, that as soon as a train parts the brakes apply themselves automatically and stop both sections of the train. It is a most valuable improvement. I would show you what the English board of trade arrived at on that subject. They said it was useless for legislation to attempt to interfere in the details of invention; that would simply stop it, and that the only effect would be to prevent improvements.

Now, I want to say that a commission, which is a favored idea of legislation, could not collect any more information or do more than we have. Ours is the very best commission that could possibly exist. It is a commission that has an area of 120,000 miles in which to operate. It is their own property, that is, the property of the stockholders; and this is their conclusion, that is, that a certain type of coupler, of which there are five hundred different patterns in existence, will meet the situations and requirements by having a rod put on them, so that they can be handled from the side of the car without injury to the switchman.

The next idea is that a time shall be fixed, admitting that all I have said is true, at which this thing shall be done. Every man who has a bill in which he has included a limit has a different limit, and the limits range from six months to ten years. Now, all I can tell you is that we think this work is going on satisfactorily. Nearly one-fifth of the cars of the United States are so equipped. Now, what time shall be fixed? Shall it be ten years? We could not wait ten years for it. I do not think we are going to wait five. I think of their own volition the railroad companies of this country are going to do this thing inside of any reasonable limit that may be made.

Mr. PATTERSON. What limit would you suggest?

Mr. HAINES. I would not care to make one. But I will give you a limit which I would suggest as proper from my own experience. As soon as the railroads which are in line with this improvement—and I have told you that by far the largest mileage in this country is in this association—as soon as they get their own cars, a sufficient number of them, equipped with this type they will put a regulation into effect that they will not receive cars that have not couplers of a like type. They are going to say, We are not going to have our men mashed up any more. We can protect our men and we do not require them to go in between cars to couple cars, and if our neighbor comes with an old coupler we won't take the car if our man has to go in between the cars. Some one will say, How can you do that? When I hear that said I feel very much like replying as Columbus did in regard to the egg as to how he would stand it on its end. It is done. Let a man come here with a passenger car with a link-and-pin coupler and see if it would be hauled. The car inspectors would put a chalk mark on that car and that would be the last of it. It is being done to-day on freight cars that are not equipped with air brakes. If the car has not got air brakes that settles it. Therefore I say that the lines in line with us on this subject will finally say they can not continue to have their men hurt by the use of the old couplers, and having paid for the automatic coupler on their own cars they will put a chalk mark on the cars not provided with them. We are persuading the other lines to come in with us. If you fix this limit for them I am afraid you will make it too far ahead and they will wait until the last moment. I think we can fix it for ourselves just as soon as we get a sufficient number of our cars equipped.

Mr. LIND. It is conceded, then, that the automatic or air brakes that are now applied to freight cars are a success, are they not?

Mr. HAINES. No, sir.

A MEMBER. Have you read the bill introduced by Mr. Henderson, of Iowa, in the House? He fixes five years in that bill for this law to go into effect and also provides for the principle that you contend

for. I would like to ask you if you think five years would be too long a time.

Mr HAINES. It would not be too long a time to make it a penal offense. We are pushing the work just as fast as we can. Possibly as soon as we get these couplers applied largely to our own equipment—I would not like to say it outside of this room—but when the American Railway Association gets along to the right position they will probably say to their friends on the outside that they can not afford to have their men mashed up.

Therefore, I say that no commission you can appoint will accomplish any more than ours has already accomplished. No committee can hasten the time in which this work will have been accomplished. We are going along now from one to the other, and it is not an easy matter to couple that kind of coupler to the link-and-pin coupler. And so long as the link-and-pin couplers exist men will be hurt in manipulating the automatic coupler in connection with the link and pin, and they will complain of the automatic coupler. They will say we can handle the old link-and-pin coupler better. But this will not be true when there are no link-and-pin couplers left.

Mr. PATTERSON. If I understand you, there is no legislation needed?

The CHAIRMAN. Mr. Haines, I will have to ask you to be as brief as possible.

Mr. HAINES. I am going to make my last point now.

The CHAIRMAN. I would like to inform the committee that we have authority to sit while the House is in session.

Mr. HAINES. Now, the other point is the penal part of it. I have talked about the Commission. I have talked about fixing the date after which no car except those equipped with the accepted device shall be used in interstate commerce. Now, the other point is the penal part of it. Of course you are going to attach some penalty for failure to comply with the law; but I can tell you that no matter what the penalty may be it is going to be construed strictly by the courts. The only thing you can do with us penally is that if one of our men gets hurt after the thing is far enough along to be in general use and the car is not equipped with what is recognized as a safety device, there shall be no plea of contributory negligence of any kind. When we get to the right stage we will be prepared to take that sort of physic. You can say, when that time comes: Your omission to have the safety device makes you liable and you must stand the consequences, and you can not make any plea of contributory negligence.

Mr. PATTERSON. Is not that the law already?

Mr. HAINES. No, sir.

Mr. PATTERSON. I believe that a railroad company is compelled by law to adopt the best appliances.

Mr. HAINES. I do not wish to take the time of the committee any longer. I believe I have covered all the points. I believe I am through. I will say that in view of the importance of the question, and feeling that I am doing the talking for all the railroad companies of the United States (I mean all that are in our association), I do not feel that I have taken up a great deal of your time. It is a big subject.

Mr. PATTERSON. Is there any bill before Congress that meets with the approval of your association?

Mr. HAINES. No, because all have commissions or something of that sort. I ask you not to fix upon any particular patent. Do not give one man a monopoly to spend twenty-five millions for us; he will make it forty. Do not give any one man the right to put his patent on all the cars in this country.

A MEMBER. In view of the rapid advance made already in the adoption of this device, according to the action of the railroad companies within the last few years, within the last two or three years, do you not think it will come into universal use within the time limited by this law, or would any law be necessary at all?

Mr. HAINES. You will bear in mind, please, that without any legislative intervention whatever there is an interlocking coupler that is used with absolute safety on passenger trains all over the United States.

I will just say one more word, and that is, if you want any further information on this subject we can give it to you and would be glad to do so.

STATEMENT OF JOHN DOWNEY, OF THE SWITCHMEN'S MUTUAL AID ASSOCIATION OF NORTH AMERICA.

Mr. DOWNEY. I represent an organization that is composed principally of switchmen—of men who are engaged in that occupation; men that break up and make up trains all over the United States and Canada. The objects of that association are to advance the interests of its members socially, morally, and financially, and, in fact, to advance their interests in every way, shape, and manner that it is possible to make them good and respectable citizens.

The duties of the man that is working in a freight yard is to take the trains as they come in and break them up, as the saying is, and put them in the proper place to go to the different yards when they are billed to these different yards. Their duties are also to take cars that come in from the various yards and put them in the various trains for the proper destinations all over the country, and in connection with their duties they do about 90 per cent of the coupling that is to be done in the railway service—that is, of coupling the cars.

Now, Mr. Haines in his remarks led you to believe that the railway corporations had adopted this master car-builders' device for passenger cars in the interest of the employees. I want to say that from personal experience I do not believe that was a fact. I believe there were other considerations, and I believe the traveling public was the principal consideration that made the railway companies adopt the device for passenger service. I have been twenty years switching cars for the Pennsylvania Company in Chicago and I do not recollect one man being killed on passenger cars in that service. That is a fact and I do not believe it can be disputed. Passenger cars are handled very tenderly. You are liable to break windows, liable to break everything in connection with them. In making up passenger trains you have got to handle the cars nicely and slowly and carefully. You have got lots of time to handle them. With freight cars it is different under the present conditions. You have got to handle them as fast as you can to keep the commerce of this country going. The various devices that we have at present are an outrage to the men engaged in the switching of cars. Since the

adoption of these various devices our death rate has increased at a wonderfully large ratio—a good deal larger than the increase of membership. And this Congress, if they have the power, ought to put their foot down on the use of the various devices they have got and adopt one single standard for the use of freight cars.

Now, in regard to the tests of the various drawbars, I have been present at one or two of them. They will take this Master Car Builders' type and equip forty cars with it and run it out of town on 15 or 20 miles of straight tracks and of course they work nice and smoothly there; but you take the conditions that exist in the various yards of this country and the Master Car Builders' type does not couple all the time. You have got to use the link and pin one out of every five, and sometimes more than that, and in a good many instances they uncouple themselves. The knuckle is out of order and you have got to fix that. That is not all you have got to do. You have got to open the knuckle often and have got to reach in, and lots of times it sticks, and it is pretty hard to pull out: so you have trouble when those couplers and the link-and-pin couplers come together. And there are lots of other difficulties, all due to lack of uniformity.

Our association holds annual conventions and they represent in the neighborhood of probably four or five hundred towns in this country and Canada. At these conventions we adopt resolutions in regard to what we think will be for the good and welfare of the members of the association. At our Buffalo convention we adopted a resolution favoring as a standard the link-and-pin coupler with a recess or a concave in the face, as being the best adapted to our use in connection with the switching service. At our convention at Philadelphia last September we adopted a resolution, which was unanimous, that a standard link-and-pin drawbar was the type preferred by the men engaged in that service. Now, who are to be the judges of what kind of a drawbar ought to be adopted? Is it the men who make the drawbars or those who use them? I want to say to you candidly that you could not get the men who make the drawbars to go in and couple the cars. You could not get them to do it for $100 a minute. And while this condition of things exist with so many different kinds on the market, they are going to keep on killing and injuring men in this country just as fast and faster than at present, and Gods knows they are doing it fast enough now.

Now, in regard to the preference of our members for the various devices, I want to say that there is a difference of opinion among the members. Some prefer one and some another. Some say this device is a good one, and some say another. But all of them prefer that something uniform shall be adopted in regard to this drawbar question. They want something uniform, something standard. We do not want anything that will interchange; we do not believe that is good for anything. We want something made in the same model all the way through and nothing else.

Mr. O'Neill. What do you mean by a concave face?

Mr. Downey. A recess in the face. It is just a kind of a cut out of the side, so that when a man puts his hand in to couple, if the cars come together his fingers will not be caught.

Now, the Master Car-Builders' type of coupler, in connection with the various other types of to-day, does not fill the bill. They are killing more men and maiming more than has ever been done before.

Mr. O'NEILL. What is the death rate in your organization?

Mr. DOWNEY. About sixteen a month.

Mr. O'NEILL. Out of how many?

Mr. DOWNEY. Sixteen out of ten thousand. We paid out last year $170,000.

A MEMBER. Those were not all caused from coupling?

Mr. DOWNEY. That is the total death rate. I do not know just the number killed by coupling. But take, for instance, our last assessment. There were sixteen names, and only two died a natural death, and they died from exposure, etc., to the weather.

You want to understand that the switchman's life in the daytime has an even chance with death. But a man who works after dark has not a ghost of a show under the present condition of things. All he has is a little bit of a hand lantern which throws a light probably 10, 15, or 20 feet. He goes in to make a coupling. He does not know the conditions that exist there. He can not tell whether it is a Janney or a Hinson, a Dowling, a Drexel, or some other kind of a drawbar. He can not tell whether it is a link-and-pin coupler or an automatic. And in the zeal he manifests to do his work properly his discretion sometimes gets the better of him, but he has got to couple those cars, and at night he can not make any preparations to do so until the last moment, just as the cars come together. If there was a standard coupler adopted, in these instances he would know what to expect and would not have to wait until the last moment to get around and do this work. Freight cars are handled very recklessly; they are thrown around very recklessly, and sometimes men have to make couplings when cars are moving at a rate of 6, 8, 10, and 12 miles an hour.

Mr. PATTERSON. What is your objection to the method prescribed by Mr. Haines?

Mr. DOWNEY. I have not stated that I have any objections. I have given you the opinion of the association that I represent; the opinion of the association that the inventions are no good at the present day; very often the side bar won't work. They are no good simply on account of the mixed condition of affairs.

Mr. COOMBS. You say the side bar does not work?

Mr. DOWNEY. Half the time it is out of order. Another thing, it is liable to catch a man's coat in working around the cars. When that car is to be coupled with a link-and-pin coupler you have got to go in and pull the pin out. If you have this rod out here it is likely to strike you and throw you down. In this Master Car-Builders' type oftentimes you have got to put your foot up and force the drawbar over to the proper place. Mr. Haines stated that a man coupled passenger cars by simply pulling this lever over. Now, I have worked with Janney couplers for a number of years. I did all the passenger work in Chicago and I invariably had to reach down and throw that knuckle out with my heel. You have to throw it out with your heel and half the time strain yourself in trying to do it.

A MEMBER. Is it the opinion of your association that the link and pin is safer to handle than any of these automatic couplers?

Mr. DOWNEY. That is the opinion if the link and pin is made the standard.

Mr. HOUK. Do you think that any improvement could be made, provided Congress made a law requiring a uniform standard?

Mr. DOWNEY. These patents might be well enough if there were no other kinds of couplers, if they were all exactly the same, but under the present condition of things in the various yards to-day these patents are not worth the powder that it would take to blow them out of the room.

Mr. MALLORY. What are these conditions?

Mr. DOWNEY. The various cars; high and low cars; low trucks; loaded and empty cars; the different types that come in contact with each other. Mr. Haines says, I believe, there are five hundred different types. Now, remember, understand the work a switchman has to do, and you can probably appreciate the condition. Some of you some day, when you have time, go down here to the Baltimore and Ohio depot and watch the switchmen doing their work, and you will probably find out how hard a swichman's life is.

Mr. HOUK. Then, taking that present condition as a fact, that there are so many different devices, do you not think it safe to have some device adopted that would secure safety according to the general rules laid down by Mr. Haines in his remarks?

Mr. DOWNEY. As I stated to you, our convention says in so many words that they want something as a standard. They have expressed their preference for the link and pin on account of the different varieties.

Mr. WISE. Would you not like to have an automatic coupler?

Mr. DOWNEY. The link and pin is practically automatic. With the link and pin and the cars kept apart so that you could go between them there would not be much trouble. It is practically automatic. You simply set the pin and when the cars strike they couple themselves.

Mr. O'NEILL. The trouble is not only with the type of drawbar, but also in the construction of the cars?

Mr. DOWNEY. Difference in the patterns and ..e kinds of cars.

Mr. COOMBS. Would 4 inches be enough play?

Mr. DOWNEY. On the sides? There is not 4 inches in any of the master car builders' types.

Mr. COOMBS. I mean up and down play.

Mr. DOWNEY. If you mean a difference of 4 inches from the rail in the height of the drawbars, yes; there must be some play.

Mr. MALLORY. I understood you to say that there was comparatively small loss of life from coupling passenger cars.

Mr. DOWNEY. In twenty years I do not know of one man killed in the Pennsylvania service in the passenger yard in Chicago.

Mr. COOMBS. Do they use the link and pin there?

Mr. DOWNEY. No. Now the biggest part of the switching of passenger cars is done by means of the "Y's." The train is pulled out of the passenger depot one way and put in in another, and is ready to go east or west as the case may be.

Mr. MALLORY. If the freight car had a small platform like the passenger cars, a platform upon which the switchman could stand, would not that insure safety?

Mr. DOWNEY. It might, but I could not say as to that. You will never secure safety in the switching of cars until the existing condition of things is changed. They expect you to do too much work in too short a space of time. The work has to be done in a hurry to

keep the commerce of the country moving. In nine cases out of ten the railroads have not enough yardmen. Switchmen have got to work fast and hard in order to keep things going.

Mr. PATTERSON. Have you any plan of legislation of your association that you desire to lay before Congress?

Mr. DOWNEY. No, sir; our association has no plan, only at our last convention there was a memorial drawn up, addressed to this Congress, requesting them to appoint a commission and have a test of the various drawbars; and as far as the constitution of that commission is concerned they did not care whether the railroad men were represented on it or not. They had just as lief that there be a lot of farmers on that commission if they would only adopt some standard and some standard style of drawbar in order that these deaths and total disabilities might be discontinued.

Mr. O'NEILL. You mean to have some uniform type agreed upon?

Mr. DOWNEY. That was about the gist of the memorial they were going to present, but we did not adopt it.

Mr. O'NEILL. You were speaking about the height of cars. You meant the difference between loaded and empty cars. There is a difference of about four inches in the height from the track of loaded and empty cars?

Mr. DOWNEY. Sometimes more.

Mr. O'NEILL. I mean ordinary cars.

Mr. DOWNEY. Sometimes; and that should certainly be regulated. Now in conection with the dangers of coupling there are lots of other dangers. All the dirt should be removed from the various yards. All these things in connection with the various types of drawbars make the death rate terrible. Now, when I say our death rate was about 16 a month, you must understand that a number of them were not engaged in this business of coupling. There is another organization here of switchmen who will tell you that they pay in the neighborhood of $30,000 a month. These death rates keep on increasing as the master car-builders' coupler are being introduced. There is no question about that.

Mr. O'NEILL. Now, in speaking about different couplers, all are liable to get out of order, and then you have got to come back to the link and pin. I have talked with railroad men in my section, and they attach a good deal of importance to the question of having something to catch hold of. Sometimes there is a ladder on one end. But generally when they go in between the cars to couple, and they slip or train starts, they have nothing in the world to catch hold of.

Mr. DOWNEY. He simply has the side of the car to catch hold of.

Mr. O'NEILL. Do you not think that if there were a rail along the side of the car it would save a great many lives?

Mr. DOWNEY. Yes, sir. In this connection I want to state that the master car-builders' types are fixed so as to couple with the link-and-pin, with the exception of a very few types.

Mr. LIND. That is only to enable them to be used in connection with the cars which have link-and-pin couplers at the present time.

Mr. DOWNEY. It should be stopped. It is killing switchmen every day.

Mr. LIND. The link-and-pin feature is not for permanent use; it is to enable the railroads to use those cars in connection with the link-and-pin cars.

Mr. DOWNEY. They have abandoned that in the passenger-car service. They refuse to take a car that has not the proper equipment. Now, if they can do it in passenger service, why not in freight?

Mr. LIND. I see no reason why they can not. But I want to elicit your opinion as to whether it was intended to use the link-and-pin contrivance permanently or not.

Mr. DOWNEY. You have got to use the link and pin in lots of places. It is utterly impossible to couple the automatic very often. The man who made it can not couple it. He has got to use the link and pin very often. And even in the passenger service you could not couple the passenger cars under all circumstances, and they will come uncoupled any time. With the various curves in the yards you have to use the link and pin; sometimes they won't couple on the curves.

Mr. COOMBS. Did you ever see a coupler that met your approval?

Mr. DOWNEY. I have seen 400. For my own individual preference I would prefer to go right back to the Lehigh Valley link-and-hook coupling than to work under the present condition. That is my individual preference, and I would sooner work all that type than under the present condition.

A MEMBER. Do they not become unhooked?

Mr. DOWNEY. They very seldom come unhooked. The trouble was to unhook them. I never handled them on any other road.

I have said about all I wish to say, Mr. Chairman, and, knowing there are others who wish to be heard, and thanking you for your kindness, I will now close.

STATEMENT OF GEORGE G. CROCKER.

Mr. GEORGE G. CROCKER. Mr. Chairman and gentlemen of the committee, I appear here as chairman of a committee of safety appliances appointed at the last national convention of railroad commissioners, held at the rooms of the Interstate Commerce Commission in April of last year, with instructions to appear before Congress and urge the adoption of some measure which shall hasten the equipment of locomotives with driving-wheel brakes, and freight cars with freight brakes, and also the equipment of freight cars with uniform automatic couplers. This committee of which I am a member has brought the matter, which it was instructed to do, before Congress by a petition which has been presented both in the Senate and the House of Representatives, and I wish to call your attention to the fact that this meeting has proceeded thus far in rather an unusual way, inasmuch as the persons who were petitioners for legislation are not the ones who are first heard. The gentleman who opened the hearing this morning is one who appears here to oppose any legislation whatever. Therefore, the opponents of legislation have in this case been heard first. Mr. Downey, who appeared immediately before me, stated that they desired legislation on the subject in the same way that we desire it.

The CHAIRMAN. Mr. Crocker, I will state that this argument is all being taken down, and it makes no difference in what order they come.

Mr. CROCKER. I only want to have it generally understood now, so far as this matter is concerned, that it is one which has engaged the attention of the several States for a number of years. It has engaged

the attention of the railroad commissioners of the several States both in their own States and when they have assembled in convention at Washington at their annual meeting, and has been discussed from time to time. Numerous resolutions from the several States have been sent to Congress and resolutions have been adopted by the conventions of railroad commissioners in previous years, and they culminated in the adoption of the resolution appointing the committee of which I am a member and in the adoption of resolutions in several of the States, which resolutions have been presented to Congress; and so far as the State of Massachusetts is concerned Massachusetts has adopted resolutions urging legislation both last year and this year, and has appointed committees to come to Washington to urge action upon the subject, which committees are here this morning.

Now, I wish to say this in the beginning to the committee: This movement, this feeling that something must be done with reference to the matters which I have suggested, is one which is widespread over the country. It finds voice among the railroad employees, it finds voice among the railroad commissioners who represent the public, and it finds voice in the legislatures; but you will readily see that while all these elements agree that something ought to be done, they have not the ready means of getting together and of organizing their movement in the same way that the railroads have the ready means of getting together and organizing opposition to any movement, and therefore when we come before you and suggest various drafts of bills to you, the one end and aim which we all have——

The CHAIRMAN. Mr. Crocker, without desiring to interrupt you, the committee would like you and the other gentlemen present to tell us what you want.

Mr. CROCKER. I was only telling you why these gentlemen did not agree, and it is very natural we should not agree because we come from all parts of the country, and the fact that we do not agree shows that it is a spontaneous movement rather than an organized movement.

Now, let me call the attention of the committee to the importance of this subject, and it has not yet been called to the attention of the committee. During the last year for which we have returns of accidents in the United States there were over 8,000 employees killed and injured in coupling and uncoupling cars. Now, the total number of employees killed and injured in all the various dangerous occupations to which railroad employees are subject is 22,000 per annum, so that the number of employees killed and injured each year in coupling and uncoupling cars is over one-third of all the accidents which happen to railroad employees. If you add to that number those who are killed and injured by reason of the lack of train brakes on freight cars, those who are injured by falling from trains, or on account of overhead obstructions, you have a total of 11,000 per annum killed and injured in the operation of our railroads, or more than one-half of all the employees who are killed and injured in the operation of our railroads. The number of persons who are killed or injured in coupling and uncoupling cars is more than two and one-half times the number of employees that are killed in all the various train accidents, collisions, derailments, etc.; an army of 8,000 men are killed from coupling and uncoupling cars, and 3,700 more men from the lack of train brakes on freight cars are every year being mutilated and killed, and that constitues more than half of all the accidents to employees.

It is, therefore, a matter of very grave importance upon which we are talking to you when you consider the statement which was made by Colonel Haines, that the adoption of the Miller hook on passenger cars has practically eliminated all accidents in coupling and uncoupling passenger cars. You will see that if anything can be done to secure the equipment of freight cars with uniform automatic couplers it means a saving of life and limb of over 8,000 persons per year, which can well repay the careful thought of this committee. Now, gentlemen of the committee, I wish to give the fullest commendation to the several railroad companies for all that they have done toward the solution of this problem. The action of the Master Carbuilders' Association, the action of the American Railway Association, have been very commendable. They are making progress. You have been told that the American Railway Association has adopted a standard for its association. The trouble is, gentlemen, that the railroads of the country are not obliged to conform to that standard, and all the railroads of the country do not belong to that association, and some of the railroads belonging to that association do not conform to that standard and are to-day building cars with couplers of the link-and-pin type, or some other type which does not conform to the standard.

You have been told what progress has been made during the past three or four years; 134,000 cars have been equipped with the Master Car Builders' type of coupler. Well, gentlemen, that is less, probably, than the total number of new cars that have been built, and you have been told and we know that there are new cars being built to-day all over the country with other types of coupler which will not couple with the Master Car Builders' type; and we are told by Colonel Haines that little or no progress has been made with reference to the equipment of old cars with the Master Car Builders' type of coupler. Now, you must bear in mind this distinct proposition, that an automatic coupler is not an automatic coupler unless it meets another coupler of the same description. You or I or anybody can invent automatic couplers which will work admirably with a coupler of exactly the same type, but if an automatic link-and-pin coupler meets an automatic Master Car Builders' type of coupler the result is that the danger instead of being decreased is increased. It is greater than it was with the old link-and-pin without the automatic quality.

The railroads throughout the country have not adopted a standard type of coupler. One section of the country, notably the section from which I come, has put on the link-and-pin, and another section has put on the Master Car Builders' type, and other sections are buying other types which do not harmonize with them, and the point which we wish to make is this: That while we believe that Congress should keep its hands off railroads as far as possible, and interfere with their management just as little as possible, while I assent to every proposition which has been made as to the inadvisability on general principles of Congress or legislatures interfering with the operation of railroads, still there are exceptional circumstances under which such legislation is proper; and if there ever were exceptional circumstances under which such legislation is proper, they exist in the present question of couplers on freight cars. In this case you have not simply to require railroad companies to adopt some automatic coupler. Some steps

must be taken further in order that the adoption of an automatic coupler may be brought about, and it has been said, "Why not leave this question to the various States?" That proposition, I suppose, needs no answer, because it is plain that if one State adopted one coupler and another State another, the result would be just what we are trying to avoid.

Mr. O'NEILL. It would take a Federal law to obtain uniformity?

Mr. CROCKER. Yes, sir. The question is, shall we leave it for the railroads to work out uniformity, without suggestion, without any action on the part of Congress, or shall we take some action in the direction of selecting a coupler which shall be the standard for the whole country, or shall we so place the question before the railroads of the country and say to them that unless they agree upon a uniform automatic coupler, agree to apply it to all new cars and to all old cars, that then Congress will take a hand in the matter? Now, various bills have been proposed. I am not here to antagonize any bill which has been suggested.

Mr. PATTERSON. I was going to suggest, my friend, that I imagine the general idea prevails that relief can be had and ought to be granted by Congress. It does with me, and now, what plan have you to suggest; what legislation do you desire?

Mr. CROCKER. The committee of which I am a member has considered various drafts of bills, but we have not had time to agree upon any measure which can be presented as the bill of the committee. Three members of the committee have, through correspondence, practically agreed upon a bill which was submitted yesterday to the Senate committee and which will be put upon your files. Another member of the committee suggests the appointment of a commission to determine what should be the standard coupler. So far as my views in regard to it are concerned, it has seemed to me that while it was desirable that Congress should do something, it should proceed in a conservative way in this matter. I want something done, and I would rather have almost any bill adopted that has been presented than leave the thing as it now stands without any action whatever. The bill which I have prepared, and which I submit for the consideration of the committee, is a bill the provisions of which are very simple. The first section relates to the equipment of locomotives with driving-wheel brakes.

The CHAIRMAN. Have you compared it with the bill introduced by Mr. Henderson?

Mr. CROCKER. So far as the first five sections of the bill are concerned there are similar provisions in other bills. So far as the sixth section is concerned it contains a provision which is not embodied in any other bill, a provision which relates to couplers on freight cars. Now, I want the committee to understand that this is simply a suggestion of my own, and the bill has been drawn with the idea of interfering just as little as possible with railroads in the management of their affairs, and of bringing about just what we desire to bring about. Section 6 is as follows:

On or before the 1st day of July, A. D. 1893, every such common carrier shall file with the Interstate Commerce Commission in Washington a statement certified to under oath by the president and clerk of the corporation, as the action of said corporation through its board of directors, setting forth such details with reference to the height, form, size, and mechanism of freight-car couplers as

it deems essential in order to insure requisite uniformity, requisite automatic action, and requisite safety in service, and also stating the number of freight cars owned by it and under its control, and also the number of other cars under its control by lease on the 30th of June, 1892, exclusive of those used solely for State traffic. Such statements shall be made upon blanks to be provided by the Interstate Commerce Commission, and the determination of such Commission in relation to the validity of the several statements received shall be final. If, upon examining the statements so received, said Interstate Commerce Commission is of opinion that companies owning at least 60 per cent of the freight cars owned and controlled as aforesaid by companies which shall have duly filed statements as aforesaid have agreed upon such details of freight-car couplers as will insure requisite uniformity, requisite automatic action, and requisite safety in service, and if said Commission is satisfied by bonds or otherwise that the royalties to be charged on any inventions involved in the details agreed upon as above shall not exceed a sum per coupler which it deems to be reasonable, said Commission shall thereupon declare and publish that coupler complying with such details so agreed upon shall thereafter, until otherwise ordered according to law, be the standard coupler for use in the freight-car interstate service.

Mr. MALLORY. Suppose the Interstate Commerce Commission do not obtain statements from companies owning or controlling 60 per cent of the freight cars, what would be the result?

Mr. CROCKER. That is a possibility which will immediately suggest itself to you in regard to the bill. My idea in regard to it is that it gives the railroad companies an opportunity to themselves establish a standard, which standard shall be legalized, and which the other companies shall be forced to adopt in the future. Now, as you suggest, they may take such action as would prevent an agreement, but I do not believe they would. I think that if they have this opportunity of establishing a standard, a standard which would be legalized throughout the country, that they will avail themselves of the opportunity and will agree by concerted action upon these details. Then the standard will be established by the railroad companies themselves instead of by Congress. You see the point of this bill is this. It is not compulsory but it operates upon the railroads with moral force for the reason that if this opportunity is given them and if they fail to come to an agreement among themselves as to what the standard shall be, then the nationalist who says Congress should take the affairs of railroads into its own hands and control them will have the strongest argument which could possibly be made, and we, too, shall be able to go before Congress at its next session and say: "Every reasonable opportunity has been given to these railroads to come to an agreement and establish a standard for themselves, and they have failed to improve the opportunity for some reason, either because they could not combine on this matter or from some other cause they have failed to improve the opportunity, and have demonstrated the essential necessity of Congress interfering in those matters in which uniformity is essential."

It is true that that is not a provision which will insure action on the part of the railroad, but it is a conservative provision, and if the committee should consider that a provision of that sort was not sufficient to insure action on the part of railroads they might insert a provision that if a standard was not established in that way, either that a commission should be appointed, or that the master car-builders' type should be declared to be the standard type, or they might take such other action as they deemed best. I believe, however, knowing what I do of the frame of mind in which the management

of the several railroads is, that the effect of the provision under review would be that they would get together.

Mr. PATTERSON. Let me ask you a question right there. Would not a very simple statute reach this point? Suppose a time was fixed, say one or two years, for the adoption of a standard type, and if at the expiration of that period no standard is adopted, that then the roads should be made responsible for all accidents to brakemen, switchmen, or other employees growing out of the inequalities of coupler. Now, if the railroad companies are made responsible for damages, would not that force them into uniformity? In that way the juries of the country would force them into uniformity.

Mr. O'NEILL. Each line would adopt a safety coupler of its own, and there would still be an absence of uniformity.

Mr. PATTERSON. Suppose each line adopts a different coupler; if they are mulcted in damages every time an employee is killed or injured, will not that force them into uniformity?

Mr. O'NEILL. How are you going to determine which road is responsible for the departure from uniformity—the road that owns the car that causes the accident or the road in whose yard it may be at the time of the accident?

Mr. PATTERSON. What I mean is this: Here are two cars coming together. One has an automatic coupler and the other an old link-and-pin coupler. The switchman in coupling the cars meets with an accident and the accident is attributable to the fact that the couplers are not uniform. Now, let that fact alone, if established, subject the railroad company to damages.

Mr. CROCKER. I simply desire to express my earnest wish—my earnest conviction—that something should be done to expedite the equipment of freight cars with uniform automatic couplers. As to the form of the bill we must leave that to you after hearing all that can be said in regard to it. I feel, gentlemen, that it would be better even to pass a resolution calling the attention of the railroad companies to the fact that Congress believes that they ought on such matters as this come to some agreement to establish a standard which shall be conformed to by all, with the suggestion that unless they are able to manage this affair for themselves it is a case which would certainly justify interference by Congress.

Mr. PATTERSON. The point I am getting at is this: Here is a railroad company. They are operating cars which may belong to different companies, but the fact that these cars are in the company's yard and that they caused the accident could be made contributory negligence on their part, and subject the road to damages.

Mr. STORER. Is it, in your judgment, Mr. Crocker, possible to pass such a statute as that suggested by Mr. Patterson?

Mr. CROCKER. I do not think it is expedient for Congress to legislate in behalf of any particular style of coupler. I think Congress should in some way force a determination of that question by the railroad companies and the companies compelled to comply with reasonable expedition.

Mr. PATTERSON. My proposition is a little drastic, it is true, but if the want of uniformity in couplers is made the efficient cause of inquiry, would not that effect a speedy adoption of uniform couplers by all the railroads of the country?

Mr. CROCKER. I am not able to state positively. I think there is a great deal of force in the suggestion and I should be unwilling to state whether I considered it feasible or not until I had considered it more carefully. Of course, your aim is the same as that we all have—uniformity, and it is for your committee to decide what is the simplest way of doing it. The question arises whether if such a law were passed a railroad which adopted link-and-pin couplers would be justified in refusing to receive any cars loaded with interstate freight which were equipped with the master car-builders' type of coupler, and whether there might not be some trouble in regard to interstate business on that account. But the idea which you suggest is a new one.

Mr. PATTERSON. My idea is, let them pay for the music.

The CHAIRMAN. Gentlemen, there is a committee here representing the Massachusetts legislature, who will next be heard.

STATEMENT OF MR. BLISS, OF MASSACHUSETTS.

Mr. BLISS (a member of the committee of the Massachusetts legislature). I am sent here as a member of the delegation of the general court of Massachusetts to bring to you a resolution that has recently been adopted, and to urge upon you the necessity of some legislation in reference to this subject which you have been considering this morning.

As a member of the railroad committee of the legislature of Massachusetts for the last two years I can appreciate the necessity of all parties appearing before you being brief. I promise you I will take but a very few moments of your time.

When the general court of Massachusetts heard that the committee of Congress would hear parties interested in this subject, the resolution which I have in my hands was immediately adopted. It passed through both branches of our general court within twenty-four hours, and our committee that has come on here with these resolutions came with only a few hours' notice. The resolution is short and I will read it. It is as follows:

[Commonwealth of Massachusetts in the year one thousand eight hundred and ninety-two.]

Resolutions relating to the adoption of national legislation providing for the use of improved car couplers and brakes, and the greater safety of passengers.

Whereas resolutions were adopted by the last general court relative to urging upon Congress the adoption of legislation providing for the use of improved car couplers and brakes and improved devices for the safety of passengers upon railroads, and a committee of members of the last general court was appointed to proceed to Washington and represent to the appropriate committee or committees of Congress the need of such legislation, which committee has been unable to discharge its duties as yet, owing to the fact that the proper time has not arrived; and

Whereas it is desirable that there should be an expression of the opinion of the present general court upon the same subject and a committee appointed to act with the committee of last year;

Resolved, That in the opinion of this general court legislation should be enacted by Congress which will tend to prevent the loss of life resulting from the present dangerous and imperfect car coupling and insufficient brakes, and from the present methods of heating, lighting, and operating railroad cars.

Resolved, That the joint committee on railroads of the present general court be instructed to proceed to Washington and act with the committee of the last general court in urging this matter upon the attention of the appropriate committee or committees of Congress.

I hold in my hand simply a copy of the bill. We did not have time to get certified copies from the clerk, but we have telegraphed for them and they will be here to-day and I will file them with the chairman.

This matter has come up before our general court for the last four or five years, and we have all, no doubt, received through the public press abundant information upon this subject that some legislation that will control and govern the cars that are in operation in our country should be adopted. It is impossible for a single State or a few States that might be arranged together to adopt any law that will satisfy the requirement. Our interstate commerce is so great that cars running from Massachusetts to California have got to be coupled with other cars from other States, so it is needless to spend any time in arguing the importance of a measure that will govern and control the cars that are used in our country.

Massachusetts, perhaps, interested herself in railroad transportation as early as any of our States, and has tried to keep abreast of the times in railroad improvements. The railroad companies that have appeared before the railroad committee for the last few years in Massachusetts have signified a willingness to adopt some system that will be universal; and in the orders that are now being given for the building of new cars we find that they have this in mind: Some system of uniform car coupling and brakes that will readily be adopted by companies from other States. I want to urge upon this committee the necessity of speedy legislation upon the matter. It is hardly practicable, perhaps, for us, who represent Massachusetts, to bring in a bill and ask you to adopt it and pass it in this Congress, because you will hear from all sections of this country on this subject. And perhaps there is evidence that should come from honest, competent, and intelligent employees of the railroads which would weigh a great deal in your minds in this matter.

We have no bill to present, but a suggestion I will offer, that some system, some uniform system that contains a principle, that can be adopted by all the roads, should be selected. I understand there are four or five thousand patents now for coupling cars, but in a great many the same principle is adopted whereby they can all be used with safety. It is not the purpose of anybody here to recommend any particular patent or invention. But some invention, some arrangement that shall be so general in its make-up and still have enough uniformity about it that all cars can be readily coupled, should be adopted. The gentlemen on your left, Mr. Chairman, of this committee, called my attention to the fact that some one spoke of the law being a dead letter in Massachusetts. I was not here and I do not know just what he referred to, but——

Mr. PATTERSON. He referred to the fact that the Commission had adopted a number of couplers and that these couplers did not couple with one another, did not fit, were not interchangeable, and that it was worse than it was before.

Mr. BLISS. The only explanation I can make of that would be this, that no matter if the law was adopted in Massachusetts or in the New England States, we have cars running in there from all over the Union and they might not fit or couple with any system adopted in New England. So the necessity arises that Congress should require some uniformity in this matter.

Mr. PATTERSON. There has not been a gentleman yet who has addressed this committee who has any well-defined idea in regard to what the legislation ought to be. Now, probably none of us on this committee are mechanics, and it is not to be supposed that we know about these things. A good many of us are lawyers, and it seems to me that the committee here, while they want to do what is best, are very much in the dark. We would like to have some specific plan discussed, and in the absence of that it seems to me that about all this committee could do would be to adopt some general rule of law, enact some law that would compel the railroads, those who are best informed—I mean the railroad companies and their employees the best informed on this subject—to adopt some uniform system, some interchangeable system. Now, what would you think of a law which is simply a law making it negligence for a railroad company to operate cars that have not interchangeable couplers on them? It is a very simple thing and would do away with all contributory negligence, and would let the juries settle with the railroads if they did not have interchangeable couplers.

Mr. BLISS. I think that idea could be developed and perhaps could be made satisfactory. Then I can readily see that the railroads in any State would be obliged to use the greatest care, and if a freight car should come into their yard that had not the proper coupling they could refuse to haul it.

I believe that the proper way to solve this problem is this. Perhaps it may be regretted that those who appear before you are unable to present any definite plans, yet it may be very fortunate that they do not. The railroad men are the best men to offer you suggestions of a uniform plan. The master mechanics and master car builders and others composing a commission or a delegation from the various roads over this country could offer suggestions that would be very valuable on this subject, and if they once saw that Congress intended to enact some immediate legislation on the subject, they would get to work and do it. Out of 26,000 or 28,000 cars being built, I understand that 18,000 are ordered with this object in view.

Mr. PATTERSON. I have this idea, that the railroad companies are constantly inquiring as to the best mode of coupling cars. It is a question that is being constantly investigated and it seems to me that it is our duty to leave to the inventors and mechanics the theme open to investigation and improvement. At the same time the most we could do would be to enact a law requiring uniformity and interchangeability in couplers, and then if that was done make the railroad responsible where they did not have interchangeable couplers, making it negligence. That would force the railroad companies at a very early period to solve this problem and to come to a uniform system, and in the meantime when they were coupling cars if they did not have interchangeable couplers it would make them exceedingly careful and anxious.

Mr. BLISS. I offer but one other suggestion. It has been suggested to your committee that one, two, three, five, or ten years would be soon enough for the adoption of a uniform coupler, but I do not think we ought to put it too far in the future. I think that railroads should be brought right up face to face with the necessity of adopting a uniform coupler. I trust that your committee will devise some legislation that will be enacted and that we shall see immediate results.

The CHAIRMAN. Mr. Powers, of the committee of the Massachusetts legislature, will now address the committee.

Mr. DOWNEY. Mr. Chairman, there are one or two things which I failed to say before which I would like to speak about for a moment.

The CHAIRMAN. Well, we will hear you first.

Mr. DOWNEY. Now, in regard to the resolutions of our organization which were adopted preferring the link and pin to the other types, there has been some talk in connection with that that the reason we passed that resolution was because we were afraid our occupation would be gone if the Master Car Builders' type of coupler came into existence. Now, I wish to deny that statement point blank. I can state for your benefit that I can take the veriest novice in the train service, I can take a man who has never seen a railroad, and I can teach him to couple cars in thirty days if he has got the nerve to face a battery, if he has got a clear eye and brain, and if he is not killed in the thirty days I will make him a man who will couple cars. And that is not all in connection with the switching service. A man has got to understand where to put the cars, where they are to go; he has got to take a system of railroad 1,000 miles in length and know every station on the line and put every car in the train in the proper place.

Those are some of the requirements which a switchman must possess. And the idea that our business would be gone in case this Master Car Builders' type was to come into existence is foolish and should not be brought up here. There is not a switchman in existence to-day that would not bless the day when there would be no more men switching cars. They do not care a cent for their positions. A switchman is the most independent man in the world, and if the business don't suit him he tells his employer to go to—Bob Ingersoll's last home. It is simply a choice of occupation that he has taken up in his early life, and it is just like any other profession a man follows; when he gets inured to it he stays right with it. I have tried to get out of it several different times, but always drift back into it again.

Mr. KING. I would like to ask one question right there, if permissible. If it is, was not the reason for passing the resolution favoring the link and pin due to the fact of the great variety of other couplers and not because the association did not think that there was some particular coupler which, if uniformly adopted, would have been better?

Mr. DOWNEY. I have so stated to this committee this morning.

The CHAIRMAN. We will now hear Mr. Powers.

STATEMENT OF MR. POWERS, OF MASSACHUSETTS.

Mr. POWERS (a member of the committee of the Massachusetts legislature). I also represented the committee of the legislature last year. As I understand the position of this committee, you admit the evil and the enormity of the evil, and you ask us for a remedy. Now, it is not for me to appear before you as an expert upon car couplers or upon brakes, but as the representative of the sentiment of a State upon this question. The first remedy which I should suggest to you, and which has been suggested by others, is uniformity. Local

option does not work in this matter. Local option upon this question is very injurious. Now the time has come when the link and pin should be done away with. That is the view in our State. It is the view of the employees of the railroads in our State who come before our committee and argue this question; it is the view of the railroad commissioners of our State; it is the view of the railroads in our State; they all say that the time has come that some step in advance should be taken. I think that no one who has appeared before this committee has stated, while I have been here, that it should not be done away with.

The representative of the Switchmen's Association stated that in his view it was better that the link and pin should be retained. But he says that at the present time accidents have been increased because of the changes. That is natural. That must happen whenever the change is made. You would not leave us forever with the link and pin. You would not have left us forever with the cast-iron car stove. Some time the change must come. Let it come at once, or let it come as soon as legislation can be made, and in that way avoid these accidents and deaths. Do not endeavor to go backward, but go forward. Therefore, we say, do not make the uniformity according to the plan of former years, the link and pin, but make uniformity according to modern ideas of the present day and improved methods of the present day. Make the improvement in accordance with the vertical coupler, the master car-builders' type. That may not be the best thing we will ever have, but apparently that is the best we have now. Do not make the standard of any particular patent, but make a standard of a system. There will undoubtedly be mistakes, but there are mistakes made in everything. You can not have progress without mistakes, and we are here to urge upon you to take a step forward and not a step backward.

The legislature of last year passed certain resolutions upon this question. I do not propose to read them to you, but will submit certified copies for your examination if you see fit. We believe that something should be done, but we do not believe that we should prevent something being done by coming here with some particular plan and have it said we have a pet scheme that we wish adopted. We simply ask you to do something.

I will tell you one or two things. There is one other matter, and that is in regard to limiting the time in which this coupler shall be adopted. That should be strictly enforced. The gentleman from Tennessee upon this committee has made a suggestion which seems to me would greatly hasten the matter. If you fix the penalty of compensation to those who are maimed and as assets to those who are killed by reason of the noncompliance with this system, you will at once present an argument which will be effective. Therefore it seems to me that that would be the solution of this problem. Beyond all question there is, however, in my view no doubt whatever but that the plan presented to you by the gentleman from Massachusetts, Mr. Crocker, saying that when 60 per cent of the railroads should agree upon a system that the coupler they adopt shall be declared the standard, will solve this problem. The railroads of my State are just as anxious to solve the problem as the employees. It is something

they desire. They are not anxious to kill and maim these men, but they are not anxious to waste money. Neither are they heartless in relation to life and limb. But they do not wish to adopt a system which will be immediately abolished. If you say, therefore, that 60 per cent of the railroads having agreed upon this problem before a certain time, or if you do not agree from that time on any lack of uniformity in coupling shall be followed by a penalty, you will compel the sentiment of the railroads to immediately wish to agree upon a system. It is the argument of all arguments. Now, gentlemen, I do not at this time wish to say anything further.

Mr. COOMBS. Do you mean 60 per cent of the number of cars or 60 per cent of the mileage?

Mr. POWERS. I do not think it matters one particle whether it be 60 per cent of the number of cars or of the mileage. The moment you take that step you will find they will agree. Sixty per cent of the cars was the idea I had in mind, but I am willing to take it either way. I think the question is not whether it shall be settled in six months or six years, but the question is a definite time, and then the railroads will say we have got to come to a decision sooner or later, so let's come to it at once. Gentlemen, I do not care to take your time further, for many are waiting.

The following is a copy of the resolutions referred to by Mr. Powers:

[Commonwealth of Massachusetts, in the year one thousand eight hundred and ninety-one.]

RESOLUTION relating to couplers and brakes on freight cars.

Whereas from the last published statistics of the railways in the United States, being for the year ending on the thirtieth day of June, in the year eighteen hundred and eighty-nine, it appears that three hundred employees were killed and six thousand seven hundred and fifty-seven injured in that year in coupling and uncoupling cars, being fifty-six per cent of all the accidents happening to train men, and practically all these accidents can be avoided by the adoption of uniform automatic couplers for freight cars; and

Whereas five hundred and fifty-eight employees were killed and two thousand three hundred and seven injured by overhead obstructions or by falling from trains and engines, being twenty-three per cent of all the accidents happening to train men, and a large proportion of these accidents would be avoided by the adoption of the train brake on freight trains; and

Whereas the regulation of couplers and of train brakes upon freight cars is of pressing importance and is within the proper scope of the powers of the Congress of the United States, while action by the individual States on these subjects has produced and must continue to produce conflicting and unsatisfactory results; and

Whereas at the convention of railroad commissioners lately held in Washington at the rooms of the Interstate Commerce Commission, upon motion, emanating from the board of railroad commissioners of this State, a resolution was unanimously adopted providing for the appointment of a committee of five to appear before Congress as soon as possible after the opening of its next regular session, and urge the passage of measures calculated to insure and hasten the adoption of uniform automatic couplers and train brakes upon freight cars and of driving-wheel brakes on engines:

Resolved, That the senate and house of representatives of the Commonwealth of Massachusetts, in general court assembled, approving of the action of its board of railroad commissioners, do most respectfully and earnestly urge upon Congress the consideration of the foregoing subjects, to the end that the consummation which all desire may be reached with the utmost reasonable speed, and especially do we urge upon our own Representatives in Congress to join energetically in promoting wise, speedy, and effective action, and that a com-

mittee of one on the part of the senate and two on the part of the house be appointed to convey this resolution to Congress and act in conjunction with the committee appointed at the convention of railroad commissioners to urge upon Congress a speedy consideration thereof.

HOUSE OF REPRESENTATIVES, *March 30, 1891.*

Adopted; sent up for concurrence.

EDWARD A. MCLAUGHLIN, *Clerk.*

SENATE, *April 6, 1891.*

Concurred.

HENRY D. COOLIDGE, *Clerk.*

A true copy.
Attest:

EDWARD A. MCLAUGHLIN,
Clerk of the House of Representatives.

STATEMENT OF MR. MELLEN, OF THE MASSACHUSETTS LEGISLATURE.

Mr. MELLEN. I notice a disposition on the part of the committee to come to a certain point. I am a member of the Massachusetts legislature. I may claim the honor of representing some of the people who do the toiling. My friend, Mr. Crocker, represents in person a million of stocks in Massachusetts. The laboring element of Massachusetts has united in demanding that something of a beneficial and ameliorative nature be enacted by the Congress of the United States upon this subject. I am the chief officer of one of the principal labor organizations. I have spent ten years' time in the legislature of Massachusetts. I have time and again said my say in connection with legislation for the benefit of the railroad employees as well as for employees generally in the State. I have been connected with some of the foremost legislation in that direction in this country.

Now, sir, I would be pleased to know that this committee are of one mind as to the urgency of legislation upon this subject, but if this committee is of that mind I am slow to believe that the Congress, both Houses, are of that mind; if they are, they have come to it very suddenly, because I know Massachusetts in 1886, 1888, 1890, and 1891, and again this year have been asking that something be done, and this is the first intimation I ever had that you gentlemen of the National Legislature are a bit concerned and are disposed to take one step toward the end we have in view, who are endeavoring to save the lives and limbs of all the railroad employees. If I am mistaken I am pleased to be mistaken; I hope there is a sentiment permeating both bodies of Congress in favor of some legislation upon this subject. Inasmuch as we would have enacted positive legislation if it could accomplish anything, I have to say that, as has been intimated, we have cars from every State in the Union, and Massachusetts could not alone take the initiative. Therefore we ask that the nation take the initiative and give us a solution of this question.

I have heard some one say something about your passing a resolution in favor of a uniform coupler. I say if you can not do any better than pass a resolution, do not do anything. I believe it is credited to a certain gentleman who has now passed across the last river, that he said "damn the public." I say "damn the resolution." We want practical action—no resolution. You have upon this committee suf-

ficient intellect and heart to draft a law that will meet this case. Now, I can not say at this moment what it is. We were appointed not more than an hour before we started from Massachusetts. Hence we have not now a bill provided; and neither have the representatives of the labor organizations a bill provided. It should not expected of them. This is a big question. The bill provided by Mr. Crocker does not meet my views, if he will permit me to say so. I think it is a wishy-washy affair.

A MEMBER. Do you mean that bill [indicating]?

Mr. MELLEN. Yes, sir; I mean that bill. It does not meet the issue quick enough. One hundred thousand people may either lose their lives or be maimed before that would become operative, and I do not believe in such dilatory, slow work as that. We want quick work.

Mr. STORER. It is easy enough to pull down; but how can we remedy this matter?

Mr. MELLEN. I want you to understand, sir, that I am not a puller-down and that I do not appear here as such. I was going to say that I think legislation on this subject would be one of the most ameliorative laws of its kind that could be passed.

Mr. STORER. That is true; but what is it that you want done?

Mr. MELLEN. I want this committee to require that the railroads adopt an interchangeable coupler. I want them to have that coupler in operation within twelve months, if possible, and I want them to remove every stove from every car in the United States within six months.

Mr. PATTERSON. Have you any coupler in view? How do you want Congress to accomplish that object?

Mr. MELLEN. I suggest to you here what is wanted and the committee should prepare the bill. I wish legislation passed for the laboring man. I have been for the past fifteen years battling for that class. I heard the representatives of the Switchmen's Association say here that switchmen were the most independent people in the world. I will say in that connection that I never saw until last year the employees of the railroads putting in defenses of the proposition they believed in because of their fear of being blacklisted by the railroads. Hence it is not to be expected that these laboring men will appear here to propose legislation.

Mr. PATTERSON. What plan have you; what legislation have you to suggest? We are all agreed upon the necessity, I suppose. Now, you say you want an interchangeable coupler and want uniformity and all that. What have you to bring about that? How to "bell the cat" is the question.

Mr. MELLEN. I am not here "to bell cats." Perhaps I am a little sharp. My bump of reverence is not very large anyway. I respect men for their merits. I am endeavoring to raise up the great mass. I am endeavoring to voice the sentiments of the masses. As I said before, we were notified day before yesterday at 3 o'clock that we would be appointed upon a committee to come here and present the resolutions of the Massachusetts legislature to the National Congress. At 4 o'clock we started. I was given three reports which were to furnish me material upon which to make an argument, but with the exception of a few moments in the Senate room yesterday I have not had time to look at them.

Mr. COOMBS. There is a proposition here that we shall force the railroads to determine those questions themselves. There is the coupler adopted by the American Railway Association. There are three——

Mr. MELLEN. Now, Mr. Patterson has made a very practical suggestion, of which I think a great deal.

Now, with regard to the creation of that commission. I would think you could not do anything better than to appoint such a commission. I was apologizing that we did not have anything prepared to offer to the committee. If you have a commission they would report a bill. I would ask you to report a bill creating such a commission, and require to be appointed upon that commission some of the operative classes, some of the employees, some of the skilled practical men and the representatives of their organization, as well as some of the representatives of the invested capital of the railway corporations. I think, perhaps, that may be the best way out of this difficulty. I would oblige that commission, if possible, to come to a determination within a very limited time—a year, for instance. And after that I think I would embody in a law the suggestion of Congressman Patterson by imposing upon the railroads a penalty where there was a loss of life or limb by reason of some coupler that was not in accord with the recommendation of this commission. In other words, that the railroads be mulcted heavily because of the ignoring of that recommendation. It seems to me that would meet the case, and that is the suggestion I would make.

We are called here representing but the sentiment of Massachusetts. We have not come here with a bill prepared to present to you; and your humanity and you as the statesmen of the country should take upon yourselves the labor that is a little out of our rut. I suppose it is usual for you to expect that a person introducing a proposition will come prepared with a bill, and that they will not look to the committee to prepare the bill.

Mr. LIND. This committee frequently reports its own bills by way of substitute, and almost invariably does so on important measures.

Mr. MELLEN. I hope in this case that you will overlook the fact that we have no bill, and especially those who particularly represent the employee class. I would depend upon your ingenuity and good will in the premises to draft a practical, operative law, and then to force it through both Houses of Congress.

Mr. LIND. Suppose the committee should report a bill simply requiring railroad corporations engaged in interstate commerce to adopt some uniform method of coupling cars within a certain time, how would that meet your approval? Simply in the line of the suggestion I have heard made by the gentleman who was a member of the Switchmen's Association. I gathered from his argument that uniformity of plans was of greater consideration than any specific plans. How would a bill of that character meet your views?

Mr. MELLEN. That would be very good.

Mr. LIND. Might it not compel the railroad companies to get together and agree upon some plan?

Mr. MELLEN. It seems to me it would.

Mr. LIND. Now, that is a matter that I individually have to recommend to you.

Mr. MELLEN. I believe that should be done. We have upon our committee a gentleman who is not much of a talker, but he is a mechanic and an inventor, and he is willing to affirm that he himself can devise a coupler that would be interchangeable and that would meet this case. And I have no doubt that there are in this country of ours thousands of mechanics who are competent to invent a coupler that would meet the case. It is only a matter of putting the pressure upon these gentlemen who are interested in giving big dividends, to pay a little more attention to the matter. They are not heartless, they do not want to maim and kill the unfortunate employees, but yet they permit a deal of maiming that might be prevented if they were a little more solicitous of the safety of the employees.

Mr. Chairman, I would like to say more but it would not be kind to impose upon you further, and there are several others here who are anxious to say a few words.

STATEMENT OF MR. LAKIN, OF MASSACHUSETTS LEGISLATURE

Mr. LAKIN. Mr. Chairman and gentlemen of the committee, it is not my intention to take up very much of your very valuable time, as I know you have many witnesses to hear on this important matter. There are a few points, however, that I would like to bring to your notice; the first of which is that there is an immediate demand, not only on the part of the railroad employees, but also on the part of the officials of the railroads, and particularly the officials of the railroads whose terminals are in Massachusetts, and to that end this committee of the Massachusetts legislature has been directed to appear before the Interstate Commerce Committee of Congress and ask that immediate action be taken by the United States Government in this matter, inasmuch as it is impossible for any State to have authority over railroads that are outside of its jurisdiction: and we are requested to urge upon your committee the necessity of a law requiring a uniformity of automatic car couplers as well as automatic brakes on all cars for the better protection of life and limb of their employees. I would not suggest that one particular patent should be adopted to the exclusion of all others. My judgment would be to require the railroads to unite on some principle that might be modified or improved on by any road, but that all improvements should be in the line of the original principle and that it should make no difference what the form or mechanical movement of a coupler used by any road, it should work automatically with all modifications of the principle used by any other road.

How this uniform system may best be arrived at should be left to the good judgment of a commissioner, or a bill drawn by the Committee on Interstate Commerce. It would seem advisable that this change should be brought about at the earliest possible moment, but that due regard should be given to the interests of the railroads and employees. It would seem to me that three years would be ample time to complete this change, and, no doubt, would be satisfactory to all parties concerned.

I would suggest that, if such a bill was drawn, a certain per cent of the rolling stock should be changed in the first year, another per cent in the second year, and that the entire road should be equipped with these new improved devices at the end of the third year.

In a conversation with the President and the joint committee appointed by the Massachusetts legislature, consisting of the members of the railroad committee of that State, the President said that he was in hearty sympathy with our efforts, and hoped that the object might be accomplished through Congress at an early date. The Hon. James G. Blaine also voiced the sentiments of the President at an interview with the committee.

STATEMENT OF MR. KIMBALL, OF MASSACHUSETTS LEGISLATURE.

Mr. KIMBALL. With others I am here to represent the people of Massachusetts, who are pleading for some legislation that will make the labor of the railroad employees less hazardous than it now is; especially those who in the prosecution of their duties are compelled to couple and uncouple freight cars. The lack of this legislation is the cause of the maiming and killing of several thousand men every year, and the most of them the heads of families, so that the labor organizations to which this class of men belong in trying to assist them and their destitute families are paying out of their scant earnings more than $100,000 per year, and we can readily see what this great amount of money means to a class of men receiving the pay of a brakeman or a switchman. We are not here to promote the interest of any special plan or device, but to urge upon Congress the necessity of immediate action compelling the railroads to adopt some universal system of car coupling. Without doubt the railroad companies are better able to determine what coupler is best suited to the wants of all parties than anyone else, and whenever Congress takes some decided stand in this matter the railroads will be quick to agree among themselves which device is best.

At the present time, without legislation, the railroads do not like to put a large amount of money into some coupler that an act of Congress may at any time render worthless, but as soon as Congress designates to them what the policy is to be followed and what system is to be used I have no doubt but the cars will be equipped as fast as possible. With all the present devices in use, and more that are liable to follow, the switchmen in making up trains of cars from foreign roads are sure to find some new system of couplers daily, so that he knows not what kind of man killer he will meet next. Mr. Chairman, I will not weary the committee further, but I wish to emphasize the fact that the people are very much in earnest in this matter and are anxious that some positive action be taken at once.

STATEMENT OF MR. RAYMOND, CHAIRMAN OF A COMMITTEE OF MASSACHUSETTS LEGISLATURE.

Mr. RAYMOND. I appear before you as chairman of a committee of the legislature of Massachusetts of 1892, to present to you resolutions adopted by it unanimously and with instructions to urge upon your committee some definite action looking to better protection for the employees of the railroads of the several States.

We wish to impress upon you the fact that Massachusetts is fully aroused to the necessity of the occasion, and while the express form of the needed legislation by Congress is immature and somewhat vague in our minds, we trust that the ingenuity and good judgment of your

committee will be able to devise such measures as will meet the wants of the great masses, and so compel the railroads of the country to adopt a uniform system of car coupler.

I was much impressed with the statement of Mr. Haines, the gentleman representing railroad interests before the Senate committee yesterday, who said in substance that there were a great many roads which would not adopt any system of uniform couplers for fear that Congress would take some action which might be against what they might adopt, and they preferred to wait till some definite plan had been formulated. Now, it seems to me that that is a great argument, presented by the railroads themselves, for the necessity of immediate action by Congress in forcing by suitable legislation the end desired. I can not help feeling that any action taken by Congress, whether through the bill presented by Mr. Crocker, by the Lodge bill, or by the form expressed by Mr. Patterson, of Tennessee, would so force the attention of the railroads to the necessity of decided and immediate efforts on their part to accomplish the desired result, that the problem would be solved within a reasonable time. In the name of our legislature and the people of our whole State; in the name of humanity and justice to the employees of the railroads of the whole country, we ask you to take definite action in this matter.

STATEMENT OF MR. KING.

Mr. KING. I promise the committee that I will be very brief and to the point. It has been my privilege to sit with Mr. Crocker and be engaged with Mr. Moseley and Judge Cooley, who was chairman of the Interstate Commerce Commission, in the study of this question of safety couplers. When we entered upon the consideration of the question we thought it would be an easy one to solve, but we soon found that it was a complicated question, and one that very few were able to agree upon. The first difficulty encountered was the multiplicity of couplers, and, secondly, the fact that the railroad people were spending thousands of dollars upon different kinds of couplers, one company trying one kind and another company another kind, with the result that nothing was being accomplished in the way of uniformity. Now, what you want to do is to secure uniformity, and in order to secure uniformity it will be necessary to adopt some plan by which it can be accomplished. From what I have been able to gather from observation and from hearing what railroad men, employees, and owners have to say, I have been led to conclude that they can not agree.

Mr. Moseley, as the secretary of our committee, sent out circulars to the different roads asking them for their views upon the subject, and with this result: Sixty-nine roads, representing 13,000 miles of road operated, are in favor of national legislation; eighty-eight roads, representing 46,791 miles of road operated, said they were in favor of voluntary action by the railroads; two roads, representing 139 miles of road operated, were in favor of State legislation; seventeen roads, representing 11,915 miles of road operated, were in favor of the master car-builders' type of couplers; ten roads, representing 4,829 miles of road operated, are in favor of different couplers; fifteen roads, representing 9,447 miles of road operated, expressed the opinion that the matter was still in the experimental stage; while one hundred and

forty-five roads, representing 38,985 miles of road operated, have expressed no opinion about it. Now, then, the trouble about this bill my friend Mr. Crocker has introduced is that 60 per cent of the roads can not agree, and if 60 per cent did agree they might adopt the wrong thing, which would be forced upon the other roads.

I have in my pocket letters which show that the action of some railroad managers is influenced by their interest in particular couplers. Large amounts are invested in certain inventions. It costs from $15 to $25 a car to equip them with new couplers, and it is here that the moneyed interests step in. That was the first thing that shattered my confidence in the possibility of the railroads agreeing upon a coupler. I have no interest directly or indirectly in any coupler, but I have a plan to suggest to the committee. And here I may say that another thing which showed me that the railroads can not agree was the fact that railroads, such as the Sault Ste. Marie Railroad Company, managed and operated by the most practical railroad men in the country, after adopting the master car-builders' type of coupler and using it for some time, have thrown it away as old iron. The testimony of the men who came before our committee at its recent meeting in New York was, that a large number of the master car-builders' type of coupler would not interchange. The railroad managers say that they will interchange, but the boys say that they will not.

Now, my theory of this is, that we can not conclude, and that you can not conclude, what type of coupler should be adopted, and every day while we are wrangling over this thing and doing nothing, one of the boys is being killed, and every day twenty are being maimed. Yet they all agree that if they had any one of these automatic couplers, whether the automatic, link and pin, or the master car-builders' type, if it is only one kind, that this would secure uniformity and would lessen the loss of life and limb 90 per cent. Now, this is a big question, and no man can so master it as to be able to say that he knows all about it. What, therefore, do I conclude? That the railroads will not settle it because they can not agree. The Santa Fe system says that they will not adopt the master car-builders' type, but they will adopt the Safford type. The Missouri Pacific, as I understand it, is adopting some other type. The Pennsylvania system is in favor of the master car-builders' type, and other roads of other types; and so they go on. There is but one way, in my judgment, of getting at this matter, and that is by the appointment of a commission who shall take evidence from these different railroad companies, take the evidence of the master car-builders, take the evidence of the men employed coupling these cars, take the evidence of the inventors of couplers, if you please, and thus go over the whole ground. Make it a study, and then, finally, select a coupler, and let that coupler be made a standard by Congress, or by such method as may seem best, and then you get uniformity.

You can not possibly decide upon a coupler, but make it the duty of a commission to settle the matter and say what coupler shall be used. We want to secure uniformity, and we want to secure it soon, and we want to secure it without mulcting the people in damages. What we want to do is to save the employees from loss of life and limb. If it were simply a question of dollars and cents we could say, "Go on and spend this money." But we want to save the men that are being

killed every year, and we can only do it by securing uniformity. Now, I have a bill to submit, but I will not read it to you. It is the bill which Senator Cullom introduced in the Senate, the first one (bill 873), except that I strike out all before section 3. The principal feature of it is that I provide for the appointment of a commission, a safety-coupler commission, of, say, seven members, but you can fix the number to suit yourself.

One of the committee should represent the Master Car-Builders' Association, and one member should represent the men who couple cars, because, while they have not a great financial interest in it, they have the greatest interest in it, as they are yearly giving so many of their number to this question. They have a right to be represented on the committee, and I would also have upon it men who are not interested in any railroad, or in the employment of any railroad, for the reason that we want to get clear away from interest in any particular coupler. We want to get away from the moneyed interest. I provide that they shall take this evidence, and then that they shall decide upon a standard coupler; that they shall take a vote also of the railroad people according to the number of cars, not as conclusive, but merely to see what the expression of opinion is; that they shall also take a vote of the organizations of railroad employees, and in this way they will get the best evidence; that they shall make practical tests; and in this connection it should be remembered that many inventors are poor men who have never been able to get their couplers on cars at all; and I say it shall be the duty of the commission, upon finding from the evidence and information before it, what coupler is the safest and best for use on freight cars, both for the safety of employees and best for the train service, to report their findings to the Interstate Commerce Commission for approval.

Now, this is an important matter, and therefore I do not leave it to them alone. Let them report to the Interstate Commerce Commission when they decide what coupler is best, and if the Interstate Commerce Commission approve it, then that fact is certified to the President of the United States, and he issues his proclamation declaring the coupler to be the standard safety-car coupler to be used in interstate commerce. Now, there is a practical solution of this question. Notwithstanding the statement of Colonel Haines that railways representing 125,000 miles of road have adopted the master car-builders' type of coupler, we find that one-half of that 125,000 miles are not adopting it. And the boys say it won't work. There are about 50 different types of couplers.

Mr. PIERCE. Colonel Haines said there were 500.

Mr. KING. There may be 500 varieties, but there are not more than 50 in use. At the same time I do not want patentees to have the advantage and be able to mulct these people in damages for their inventions. So we provide that after this commission has selected a coupler the patentee shall file with them a bond that he will formally deliver to the United States his whole patent so that the railroads of the country can have it free. Then everybody can use it and there will be no monopoly.

Mr. PIERCE. Without consideration?

Mr. KING. Yes; let the Government pay for it.

Mr. PIERCE. And give it to the railroads?

Mr. KING. Certainly. This nation can afford to spend $1,000,000 to stop this havoc, and not haggle over it a minute. But if you do not want to do that you could provide for the royalty they should pay. We should not, however, allow a patent to be made a standard, and then permit the patentee to say "you can not use it without paying a royalty." There is no trouble about that kind of a resolution. Now I want to say that I have thought over this matter a great deal, and I feel very discouraged about getting any legislation whatever. Why? Because there were five of us who met in New York, and we could not agree upon any plan. But with a commission composed as this one would be, and charged with the duty of settling the question, there would be no difficulty about belling the cat in that way; but you can not do it by letting this and that corporation act for itself. That is the position I assume, and it seems to me to be the only way out of the woods. Now, I am only one, and I do not want to be persistent, but I have studied this question and the more I talk with railroad men the more I am convinced that they can not and never will agree. And the longer it runs the less prospect will there be of their ever agreeing because of the moneyed interests in these patents; and it is enormous, the amount of money involved in these patents. It would take $50,000,000 to equip the cars of this country with new couplers.

Mr. PATTERSON. Suppose Congress were simply to pass a law requiring the railroads of this country to agree upon a uniform and interchangeable type of coupler within twelve months, and that all railroads which use couplers that do not interchange after that period shall be liable in damages for all accidents that occur; that is, throw the burden of proof that the coupler is interchangeable upon the railroad, and if it is not interchangeable, that settles the question of damages. And add another provision that when 60 per cent of the railroad companies have agreed upon a uniform coupler, then that the President of the United States or the Interstate Commerce Commission can declare that to be the standard coupler. Now, my judgment is that when you throw the burden of proof on the railroads in this way they will go to work on this matter more intelligently, with a better result to the commerce of the country and with more satisfaction to railroad employees than any committee of Congress or any commission you can appoint.

Mr. KING. Now, my experience and my belief is that the railroads can not and will not agree.

A MEMBER OF THE COMMITTEE. Not even under compulsion?

Mr. KING. No, sir; Not even under compulsion. Here is the Pennsylvania Railroad on the one hand insisting on the master car-builders' type, and the Santa Fe Railroad, on the other, insisting on the Safford type, and there is an Illinois railroad saying: "We will not use any until we are compelled to; we would rather take our chances of being mulcted in damages. It would cost less money, and we will fight it out on that line if it takes all summer." That is my honest judgment. My bill provides for the taking of the opinion of these various railroads in regard to a standard, and it provides for this commission to superintend the taking of this opinion according to the number of cars that they have, and it provides for the different organizations of switchmen to vote on what coupler they want. In this way you get all the information there is to get, and then you have got it collected

into one hopper with a good result. Then you have your commission to collate this information, and if the railroad refuse to give the information, then you have the authority to act. In this way you can bell the cat if you have nerve enough to put it on. You can not get twenty railroad men in this country nor twenty railroad managers to come up and agree.

Mr. LIND. As the law now stands there is no penalty for their not agreeing. The agreement is merely optional.

Mr. KING. A penalty might help some, but they are killing men all the time. You are simply putting this off, and not accomplishing anything, and the slaughter is going on all the time, whereas by a commission you can do the business right off.

Mr. COOMBS. Suppose they decide upon the wrong coupler?

Mr. KING. It is the testimony of the railroad managers and railroad employees that an inferior coupler will decrease the fatality if it is uniformly adopted. They say, above everything give us one thing, and we will couple it and it will decrease the loss of life and limb from 80 to 90 per cent.

A MEMBER OF THE COMMITTEE. Your scheme contemplates taking away from the railroad companies the right to select themselves the coupler they will use.

Mr. KING. No; it contemplates giving them an opportunity of making that selection under the supervision of a commission.

A MEMBER OF THE COMMITTEE. Your bill provides for taking testimony in regard to the selection of a coupler; at the same time that vote will not be absolutely binding.

Mr. KING. No, sir.

A MEMBER OF THE COMMITTEE. Now, as there is an indisposition to deprive railroads of the right to manage their own affairs as far as is consistent with the public welfare, what do you think of this suggestion: Suppose Congress passed a law to prohibit railroads engaged in interstate commerce, under heavy penalties, from using any coupler in order to couple which switchmen would have to pass between the cars?

Mr. KING. But you have as many kinds of couplers. It might, however, help some.

Mr. STORER. Take Mr. Crocker's proposition, which is practically that 60 per cent of the railroad companies shall agree upon a coupler.

Mr. KING. That is not his proposition. His proposition is that 60 per cent of those who file their opinion shall establish the type.

Mr. STORER. The bill reads: "Which shall have filed statements."

Mr. CROCKER. The bill says that they "shall file," and then it provides that if railroads representing 60 per cent of the cars owned and controlled by them are in favor of a certain coupler, that coupler shall be declared to be the standard coupler.

Mr. STORER. I was going to ask, what would be the effect of making that compulsory?

Mr. KING. I do not think 60 per cent can agree. Besides it permits those railroads who want to defeat the project to get together, and vote for different couplers so that no coupler could be adopted.

Mr. STORER. If 60 per cent do not agree then you throw the burden upon the commission?

Mr. KING. Yes.

Mr. STORER. Suppose they decide upon something none of the railroads want?

Mr. KING. If Congress passes a bad law then they repeal it.

Mr. STORER. Would not that prevent the use of an improved coupler invented afterwards?

Mr. KING. You can not secure uniformity unless you decide on one thing.

Mr. STORER. Do you consider a Chinese wall in such matters an improvement?

Mr. KING. I consider that the only way we can get uniformity is to get one coupler and use it until we can get something else. The trouble we are in at present is the great variety of couplers in use.

Mr. STORER. Would you suggest a new commission every time a change is desired?

Mr. KING. I leave that for Congress to decide for themselves. I would put the responsibility upon somebody, and my plan is to put the responsibility of selecting the coupler upon a commission of seven men. Let them investigate the matter and report to the Interstate Commerce Commission, and if the Interstate Commerce Commission does not approve of their recommendations let them report their findings to you for further action. But if the Interstate Commerce Commission approves their report it becomes law as soon as the President issues his proclamation. I have taken up much more of your time, gentlemen, than I intended, and I desire to thank you very much.

Mr. MOSELEY. I have to say that at the proper time, after everyone here has had an opportunity of being heard, I should like to be heard for a moment, as secretary of the committee of which Mr. Crocker is chairman, to fulfill a duty which devolves upon me.

The CHAIRMAN. There is a representative here of the Yard Masters' Association, Mr. Shaw. I hope you will hear him for a few moments.

STATEMENT OF A. D. SHAW.

Mr. SHAW (a representative of the Yard Masters' Association). I will be very brief in my remarks in reference to this mater. It is a question that I can not enlarge on, having not that advantage of an education, which you have. However, I know something. I have been engaged in the railroad service for twenty-six years—half my life—working in the most hazardous portion of it, that of a brakeman, switchman, conductor, and yard master. The last work I was engaged in previous to coming here, which was a short time ago, was that of yard master of the Big Four railroad system at Indianapolis, Ind., and for twenty years—yes, for twenty-two years—I was connected with that system. The largest portion of that time I was with the Bee Line. I think I have some knowledge of what constitutes a good drawbar or what constitutes safety for those engaged in the hazardous duties of a switchman. A yard master is the man that has charge of the yards—the railroad yards where trains are made up, are unmade, taken apart, switching, we call it—taking apart the cars belonging to the different connections and transferring freight to other lines. They have charge of the making up of the trains that haul the commerce of this great country. And under their immediate charge are these switchmen, who perform these hazardous duties of coupling and uncoupling.

I desire to say this in behalf of that class of men, that they are now in a more dangerous position than they have ever been before. The reason of this is that there is more of a variety of drawbars in use on cars than there ever has been before. The numerous devices that are being put on these cars are increasing every year. It was no new thing to me to have my switchmen call my attention almost daily to some new contrivance that somebody had patented a short time before and had got the company to allow them the privilege of placing it on the cars for trial. You see this was experimenting with the employees' lives and their limbs. It is the numerous devices, the different kinds, that cause the trouble. Why, one morning we would find a drawbar—what we called a beef-tongue drawbar—a large cast-iron contrivance, and the car that it would have to couple on to would probably have a Janney coupler—that is, the automatic; what they call the automatic, but I do not think there is any coupler that is automatic. When they endeavor to couple on different cars of that kind they have to be very careful. He had to be an experienced switchman if he had to make those couplings. If he missed it he would probably lose his arm, or possibly his life.

Then, in regard to the cars, some of them are very close together, entirely too close. Take the Empire Line and the Star Line cars. They are made with a cast-iron bumper. I do not suppose that the bumper on a Star Line car gives a space of more than 4 or 5 inches. That is the space in which the switchman is compelled to go in to make that coupling. In fact, if he was a man of my size he could not get between the cars. If he endeavored to go in between those two cars he ran a great risk of his life. And if he was a large man he could not get in there at all. They have to go underneath to make the coupling, and they run a great risk even then. Probably the engineer, thinking he was not there, would pull the train forward or backward and probably kill the switchman. He would endanger his life in making that coupling. I could go on and relate to you hundreds of different kinds of drawbars that a man is compelled to couple in a day.

These men commence work at 7 o'clock in the morning and work until 6 or 7 o'clock in the evening. It is hard work; it is laborious work; it is dangerous. It is work that has to be done in all kinds of weather. Many deaths occur from exposure. I have stood out in the cold storm; I have been covered with ice; I have had icicles hanging from every part of my clothing while engaged in this duty, and I have been compelled to earn a livelihood in the coupling of cars. It is no wonder that these men ask to-day that something uniform be adopted whereby the danger to their life and limb may be lessened. One day I left home and accepted a political position here—if God spares my life I will never accept another—but I want to go back there some day, and if I do I wish to return feeling that I had been heard here, feeling that I had helped in some little degree to secure the safety of the life and limb of these men more than when I left them. I promised those men that if I had an opportunity to go before Congress and tell them of the dangers and hardships these men are exposed to that I would do so. I have fulfilled that promise to a great extent. I have been before the Senate committee. I have attended the State committee of the meeting in New York. I was before the House committee last summer. And I have endeavored in

my poor way to impress on your minds the necessity of a uniform drawbar on cars. I have felt that it was a duty which I owed them, and I want to impress it on your minds how important it is to have this done.

Those men, as I said, go to work at 7 o'clock in the morning and work until 6 or 7 in the evening. That is the day force. The night force comes on when they leave and remain on until morning. This latter class of men run a greater risk than the day force. They have nothing to see by but one of these little hand lanterns which throw a light some 15 or 20 feet.

Mr. Patterson. If I understand you, then, speaking from the attitude of one experienced in the matter, your idea is that the chief thing desired by these men is uniformity in coupling the cars, and interchangeable coupling and uniformity?

Mr. Shaw. Say uniformity, that will do. I am in favor, and the organization that I represent here to-day—the yardmaster's—all of them come in contact with these men in the making up of trains.

Mr. Patterson. It is not so important, then, what pattern is adopted or what coupler is adopted, so long as there is uniformity?

Mr. Shaw. We have no preference in the drawbar. I will say this much though. If you should go into the yards to-day and ask the switchmen what kind of drawbar they would rather have—I am only speaking now as I have heard them say—they would tell you give me back the link and pin rather than go through what they do to-day with these variety of devices.

Mr. Coombs. Do you think it best for a coupling to be provided where men shall not be required to go between cars?

Mr. Shaw. No, sir, I do not. I want to say this in reference to all these contrivances in coupling and uncoupling cars from the side, that I have seen very few of them that were anyways lasting. They make one trip over the road and when they return that car this piece that sticks out at the side is generally bent out of shape. It may have extending out beyond the edge of the car and when it passed close to another car in its trip over the road it probably did not clear the other car very well and it would be bent out of shape.

Mr. Coombs. Could it not be under the bottom of the car?

Mr. Shaw. They get out of order anywhere.

Mr. Coombs. How many of them have been invented?

Mr. Shaw. I have seen quite a number of them. I find that they get out of order, and consequently the switchman has to go between the cars to make the coupling, and if it is of the automatic type or Master Car-Builders' type the consequence is that the rod breaks and sometimes the switchmen have to take a wrench with them in order to get the bars apart. I simply want to say this, that I have no particular drawbar that I prefer. Of course I know of a great many drawbars.

Mr. Coombs. Is there any device that prevents the necessity of going between the cars?

Mr. Shaw. If a car is constructed in a way which I could tell you, or any switchman could tell you, it would help a great deal. It is immaterial about the coupler being automatic if he has to go in there to make the coupling. If the couplers were uniform the switchmen would know what to expect when they went in to make the coupling. The link-and-pin coupler is practically automatic. All you have to

do is to set the pin and the jar of the cars when they come together drops the pin.

Mr. MALLORY. Can you tell me why so few accidents occur with passenger cars that have automatic couplers as compared with freight cars with automatic couplers.

Mr. SHAW. It is simply this, that all freight cars are not equipped with automatic couplers, and then they have different automatic couplers. Every road has automatic couplers on its passenger trains.

Mr. LIND. Do you find the automatic couplers in use on passenger cars a success as a coupler?

Mr. SHAW. Yes, sir, I think they are.

Mr. LIND. Do you think that the same kind of coupler, substantially, applied to freight cars with the necessary changes would be equally succesful, considering the harder usage of the freight car?

Mr. SHAW. It might be necessary to have it a little different in construction, in the durability of them. You would have to make them stronger than those on passenger cars, but of the same type. The same type, of course, would answer as well on a freight car as on a passenger car. The railroads always put the best work on the passenger cars.

Mr. MALLORY. What I want to get at is this: If you had automatic couplers of a type similar to that used in the passenger-car service upon the freight car, and a platform upon which the brakeman could stand as he stands upon passenger cars, would it not do away with all this risk?

Mr. SHAW. That might do well enough on the road where a train is made up into a solid train and going from one place to another, but take it and put it in the ordinary freight yard and it would not answer. The switchman has got to be on his feet. He is cutting out cars and coupling them almost every moment, and he would not have time to be getting on and off the platform.

Mr. LIND. Is it not practicable for him to couple it from the top of the car or the platform?

Mr. SHAW. If he was on the platform he could not give the signal to the engineer. He would have to be on the ground to do that and attend to the other duties he has.

The CHAIRMAN. Would you favor the idea that the employees should have a voice in determining what coupler should be used?

Mr. SHAW. Yes, sir, I think they should. I have a theory in reference to that matter and always have had since this question has been agitated. I have always thought that it would be proper to pass a bill making uniformity a law and then leave the selection of a drawbar to be made afterwards.

Mr. PATTERSON. Do you not think if the railroad companies were forced to adopt uniformity that they would be more than likely to arrive at a satisfactory solution earlier than by having a commission appointed?

Mr. SHAW. In a bill of that kind making uniformity a law and compelling the railroads to adopt a uniform drawbar, I would insert a clause stating that at a certain time and at a certain place representatives of the employees and of the various organizations of which they are members, the Firemen's, Engineers', Brakemen's, Conductors', and Switchmen's, would have an opportunity to be heard. I would have each of these organizations send two or three representa-

tives to meet with the general managers, the master car-builders, and the master mechanics, and let them select the best drawbar. I would leave it to them because I think they are practical men and understand thoroughly what they want, and I have no doubt whatever, gentlemen, if you pass a bill making uniformity a law, with a clause of that kind, that within six months after the passage of the bill they shall meet and then and there decide on the kind of drawbar, they will come together and settle it better than anybody else.

Mr. PATTERSON. So far as getting a good drawbar and safety appliances there is no conflict between the management of the railroads—the general managers—and the employees as to the necessity of it, and therefore do you not think that they would consult and advise together and decide upon some good drawbar if a law requiring uniformity was passed?

Mr. SHAW. I am satisfied the employees and the managers of the road could settle it among themselves. If you pass a law requiring uniformity then the time will come when these men will meet together and they will select a drawbar. I am sure that they will come together. Now this is the proposition that I make; this suggestion I offer meets with the approval of the railroad men; it meets with the approval of the switchmen, conductors, engineers, and firemen. I read a very fine argument on this subject in a monthly publication dated the 21st day of January. It was an article from the grand secretary of the Order of Railroad Conductors. He has the same idea.

A MEMBER. Could you not send us copies of that?

Mr. SHAW. Yes, sir; and if you like I could send you also my letter read at the Indianapolis convention. I believe that these men should have a voice in the matter. They are practical men and understand what they want. If a yard master is sized up by the duties he performs he is a pretty large man, but I will say that I never yet saw the time but that my switchmen could teach me something new in regard to drawbars.

STATEMENT OF EDWARD A. MOSELEY.

Mr. MOSELEY. As the secretary of the committee of which Mr. Crocker is chairman——

Mr. PATTERSON. What committee is that?

Mr. MOSELEY. It is a committee appointed by the Third National Convention of State Railroad and Interstate Commerce Commissioners held in Washington last year, and was instructed to urge upon Congress the necessity of uniformity in safety appliances, and to present a bill.

Mr. PATTERSON. You are also secretary of the Interstate Commerce Commission?

Mr. MOSELEY. Yes, sir; and as secretary of the Interstate Commerce Commission I have devoted nearly five years to the study of the subject under discussion to-day. The statistics which you have before you I have compiled, having obtained information from every railroad and all interested as far as possible. Replies have been received from roads representing 125,000 miles, while I believe it was the opinion of the chairman of the Interstate Commerce Commission, Judge Cooley, when under his direction the matter was first looked into, as it was my own, that this was a matter which could be easily settled by

legislation. Still as time has gone on it has proved to us a very difficult matter to determine, and to-day when I heard the proposition of Colonel Patterson, of this committee, it struck me very favorably indeed. I am in sympathy with any plan which would reduce the number of killed and injured annually, but I do not want to express any opinion here to-day, there are so many to be heard, particularly as I can be called at any time before the committee. As secretary of the safety appliance committee, however, I wish to present a communication from Hon. Spencer Smith, of Iowa, who is a member of the committee and has disinterestedly devoted his energies to the subject, but who is unable to be present to-day. I have his communication in my hand, and I will present a copy to the several members of the committee. He has also sent me a bill, which has met with the approval of Mr. Rogers, of New York, and Mr. Hill, of Virginia, with the request that this committee fully consider it. I will now read his communication.

Mr. WISE,

Charman and the Members of the Committee on Interstate and Foreign Commerce of the House of Representatives.

GENTLEMEN: It may be proper at the threshold of this conference to ask your attention to a brief statement of the preliminary work already done by the committee of which I have the honor to be a member, together with a review of some of the conditions that led up to the formation thereof.

At the national convention of the railroad commisioners held at the office of the Interstate Commerce Commission, Washington, D. C., on May 28 and 29, 1890, the following resolutions were adopted:

"*Resolved*, That the respective States should require, either directly by law or indirectly through the instrumentality of their railroad commissions, each railroad corporation subject to their jurisdiction to place driving-wheel brakes and apparatus for train brakes on every locomotive constructed or purchased by it, and train brakes upon every freight car hereafter constructed or purchased by it, and upon every freight car owned by it, the coupler or drawbar of which is repaired by it, an automatic coupler of the Master Car Builders' type at each end of the car.

"*Resolved*, That Congress, either directly by law or indirectly through the instrumentality of the Interstate Commerce Commission, should take similar action."

Following up the position taken at this conference, the national convention held in Washington on March 3 and 4 of last year, after much discussion appointed a special committee to prepare resolutions upon this question. The report of the commitee was as follows, and was adopted unanimously:

"*Resolved*, First. That a committee of five be appointed by the Chair to urge upon Congress, as soon as possible, after the opening of the next regular session, the imperative need for action by that body calculated to hasten and insure the equipment of freight cars throughout the country with uniform automatic couplers and train brakes, and the equipment of locomotives with driving-wheel brakes, and present and urge the passage of a bill therefor.

"Second. That the committee, before presenting the bill to the appropriate Congressional commitee, be requested, after public notice, to give a hearing to accredited representatives of such organizations of railroad officials or employees as may desire to be heard.

"Third. That the secretary of this convention act as secretary of this committee."

Judge Cooley named the committee as follows: Hon. George G. Crocker, Massachusetts; Hon. James C. Hill, Virginia; Hon. Spencer Smith, Iowa; Hon. Wm. E. Rogers, New York; Hon. John H. King, South Dakota. Hon. Edward A. Moseley became secretary by the terms of the resolution.

It will be seen that in the last-adopted resolution the type of couplers was not specified, as was done in the resolution adopted the year previous, simply declaring for "uniform automatic couplers, train brakes, and drive-wheel brakes."

On February 28 the committee held its first meeting at Washington City, perfected its organization by the selection of Hon. George G. Crocker, of Massachusetts, as chairman, and prepared a list of questions to be sent to all of the railroads of the United States, viz:

(1) What is the total number of freight cars owned, leased, or otherwise controlled by your company?

(2) How many are equipped with automatic couplers?

(3) State the kind of couplers used and the number of cars equipped with each kind.

(4) With what kind of coupler do you cause your freight cars to be equipped?

(5) How many cars have you equipped with train brakes? State the name of the brake used.

(6) How many locomotives does your road own, lease, or control? State the number equipped with driving-wheel brakes.

(7) Please state in what way, in your opinion, the equipment of freight cars with uniform automatic couplers can best be hastened.

On November 10 and 11 the committee was in session in the Chamber of Commerce, New York City, and heard representatives from the American Railway Association, Brotherhood of Locomotive Engineers, Switchmen's Mutual Aid Association, Yard Masters' Association, Railway Employees' Association, Master Mechanics' Association, Order of Railway Conductors, Brotherhood of Railway Trainmen, members of safety appliances committee of American Railway Association, and others.

Of the roads responding to the questions sent out, 69, representing 13,014 miles of road, favored national legislation; 88, representing 46,791 miles of road, favored voluntary action on the part of the companies; 2, representing 139 miles, favored State legislation; 17, representing 11,916 miles of road, favored the Master Car Builders' type of coupler; 10, representing 4,830 miles of road, favored other couplers; 15, representing 9,418 miles of road, believed the matter still in the experimental stage, and 145, representing 38,986 miles of road, expressed no opinion as to the best means of bringing about uniformity. The Atchison, Topeka and Santa Fe and one other road favored the Safford automatic link-and-pin coupler. The fact was developed that there are now in use about 1,200,000 freight cars, of which 200,000 are equipped with automatic couplers of various kinds of the Master Car Builders' type, and about 50,000 of other types. Of the 27,000 locomotive engines, 17,000 are equipped with driving-wheel brakes. About 100,000 freight cars are equipped with Westinghouse train brakes, and some 15,000 with other types. Advanced figures furnished by Secretary Moseley, of the Interstate Commerce Commission, showing the killed and injured for the last fiscal year, were read as follows: For the year 1889, trainmen killed, 1,972; injured, 20,028; total, 22,000. For the year 1890, trainmen killed, 2,451; injured, 22,390; total, 24,841. An increase of killed and injured, 2,841, due to all causes.

Of these accidents, those due to the coupling and uncoupling of cars in 1889, killed 300, injured 6,767, total 7,067. For the year 1890, killed 369, injured 7,841, total 8,210, an increase of 1,143.

Falling from cars, year 1889, killed 493, injured 2,011, total 2,504; for the year 1890, killed 547, injured 2,348, total 2,905, an increase of 894.

The committee heard representatives of all the associations. Col. H. S. Haines, president of the American Railway Association, speaking for that body, said that it has a standing committee on safety appliances that had gone through the same course of investigation as the committee now holding this session. They hoped to lessen the loss of life and limb. They represented 125,000 miles of road, and had adopted the vertical hook type of couplers as their standard.

The railroad companies themselves had developed this type. His association had helped it along, but it was only within the last few years that something had been found to meet the requirements. The demand for this coupler was now almost universal. While it might not be the best thing, it was the best up to this time. Legislation calling for one kind of coupler would block progress. A million more cars to be equipped, at $25 each, meant $25,000,000; all the coupler makers of the country could not turn out over 200,000 couplers per year, and this equipment meant five years to replace the link and pin, to say nothing of repairs and new cars. The railroad companies would do it as fast as possible. Engine brakes are now put on practically all locomotives ordered. The freight-train brake was not yet in the condition it ought to be for long trains. The air brakes cost twice as much per car as automatic couplers. It meant an outlay of $50,000,000 to fully equip the rolling stock of the railways.

It is claimed that the Master Car Builders' type is the best form that can be devised, but that it is the best that has been up to date, and the association does not feel that it can go further. The railroads make a wider application of safety appliances in this country than they do in Europe, and in this particular case have devoted a great deal of time and money to the production of the type of coupler has been recommended. On the Plant System there are now but two cars fitted with Master Car Builders' couplers, but there are 1,000 cars under construction, each of which will be equipped with Master Car Builders' type, and I am told that this is universal on new work, showing how rapidly this work is going forward. It is doubtful whether the capacity of all the coupler manufacturers in the country exceeds 150,000 cars a year. The truth is, said Colonel Haines, the companies are advancing as fast as possible where their mechanical and financial ability is concerned.

Mr. M. N. Forney, speaking for the committee of the master mechanics' association, stated that the association which he represented was devoted to the mechanical development of railway rolling stock, and that for ten years this matter of a suitable coupler has been before the association, but the first actual steps were taken in 1884, when a committee reported to the association at Saratoga favoring the adoption of the vertical plane-hook coupler, but it was not until 1887 that the contour lines were adopted by a two-thirds vote and a letter ballot. The owners of the patents on these contour lines surrendered their rights, so that while there are numerous patents on the locking devices and details, the contour lines are free for all.

No one is prepared to say that the type adopted fulfills all the requirements. There is only one class of men who are perfectly satisfied, and they are the inventors. Hence any legislation enforcing the adoption would result in the use of something not complete and not altogether desirable.

Legislation should take the form of recommendations, like the enactments of the British board of trade. It should provide for publicity, for recommendations, for acting as a sort of recording angel on the acts of railroad managers, and depend upon practical developments for the rest.

"It is safer for the present," said Mr. Forney, "to leave it in the hands of the railroads."

Mr. T. N. Ely, of the Pennsylvania Railroad, said that his company was putting these couplers and air brakes on as fast as possible, and no law could hurry it any.

Vice-President E. B. Thomas, of the Erie Railroad, said that his company was going as fast as possible in both Master Car Builders' couplers and air brakes, including cars repaired. In time they would refuse to have cars equipped with link-and-pin couplers.

Lucius Tuttle (New York, New Haven and Hartford Railroad) said that his road was advancing without legislation. All cars repaired had Master Car Builders' couplers put on, and on all their new cars. All their engines were having air brakes put on. The coupler subject was taking care of itself. All the cars in the country would be equipped in about five years.

Maj. E. T. D. Myers, president Richmond, Fredricksburg and Potomac Railroad, spoke for the committee on safety appliances of the American Railway Association. They were doing all they could with both couplers and power brakes. He thought legislation the wrong way to do it. Public opinion was more powerful. That all the Virginia roads were putting them on; also the roads south of there, and without legislation. "No improvements in transportation," said Major Myers, "had come from anything but public opinion; that the Janney coupler was born in Virginia, and the roads there put it in use before there was compulsory legislation anywhere."

C. W. Bradley, general superintendent West Shore Railroad, said that all their fast freight cars had air brakes and M. C. B. couplers. All his connections were putting them on. He would like to reject all cars without M. C. B. couplers.

Mr. Frank Sweeney, of the Trainmen's Mutual Aid Association, said that the present varieties of draft irons were a great danger to switchmen. They could not educate themselves on the various appliances, there were so many. Something should be done to prevent the injury of switchmen. They were in favor of uniformity of height of cars. With the present mixture of couplings, cars had often to be stopped to pull the pins. With the M. C. B. type and a link it might fly either way in concussion. They wanted a uniform type of drawbar.

Regarding legislation there should be something done to enforce the standard height of cars, and some steps should be taken, either by legislation or otherwise, bearing on this subject.

Mr. D. B. Sweeney, of the Trainmen's Aid Association, favored the link-and-pin type. The vertical hook was too dangerous. They had to go between the cars to open the knuckle. The coupling apparatus was always broken. With the link and pin they knew when a car was cut, but when they threw up the lever they could never tell whether it would open or not. There was nothing better than a link and pin. Besides, said Mr. Sweeney, it is still necessary to go between the cars to open the knuckle, even when in good condition, and they will not couple on curves.

Mr. John A. Hall, of the United Order of Railroad Employees and editor of the Switchmen's Journal, described vividly the duties of yard switchmen and the difficulties they labored under. Something should be done for them. The railroads were, he thought, doing all they could for them. He had many years' experience in yard work and preferred the link and pin. The conditions under which these men worked were getting worse, and legislation was necessary unless the railroads accomplish more. A greater number of men were hurt every year. If nothing but vertical planes were used they would still have to go between the cars, they were out of order so much. He believed the link and pin could be as automatic as the vertical plane. Yet if all cars had vertical-plane couplers the conditions would be a thousand times better than they were to-day. The switchmen favored uniformity.

Mr. A. D. Shaw, of the Yardmasters' Association, favored automatic couplers and uniform length of drawbars and cars. There were too many good drawbars and too much mixture of good and bad.

Mr. Heberling, of the Switchmen's Aid Association, said that they favored a uniform link-and-pin type of a uniform drawbar, anyway. If two cars of the M. C. B. type were set together without opening the knuckles they were sure to break. Give them a uniform drawbar of some kind and it would save the lives of many men.

Mr. Roach, of the same association, followed, speaking of the danger of coupling the link and pin with the M. C. B. type. All of the new type of couplers were a detriment and an annoyance to the switchmen.

J. T. Chamberlin, master car builder of the Boston and Maine, said that their employees, who had spoken, knew better what was wanted than the officers. The men of his road all favored the link-and-pin type of coupler. The vertical-plane drawbars had broken badly on his road, and now they had none.

William McWood, of the Grand Trunk, said that personally he was opposed to the vertical-plane type. The switchmen's views coincided with his. He did not think the M. C. B. type gave good satisfaction. The pin still remained, and if it became bent the knuckle would not work. Neither were the knuckles interchangeable, which was a serious objection. More satisfaction and better results could be had from a good automatic link-and-pin coupler.

G. W. Rhodes, master car builder of the Chicago, Burlington and Quincy Railroad Company, was of the opinion that they should not make haste too quickly, and, while we may not feel warranted in giving an unqualified indorsement to the type that has been adopted, still it does seem to be the best that has as yet been devised. The Chicago, Burlington and Quincy Railroad Company has paid the closest attention to the coupler question, just as it did to the brake matter in 1887. It has paid out money freely in the development of safety appliances, and feels that there is no need of legislation to coerce it into the adoption of the coupler or of automatic brakes. At present there are in course of construction for the road 2,500 cars, of 60,000 pounds capacity, which will be equipped with M. C. B. couplers and air brakes.

Hon. L. S. Coffin closed the hearing, appealing in the name of the associations represented by him for positive legislation compelling the adoption of the M. C. B. coupler and train brakes.

The committee had a conference after the adjournment of the public hearing, at which there was a free and full exchange of opinions and an agreement reached that each member of the committee should formulate a bill covering the needed legislation and submit the same to the others for their approval, the bill receiving the majority approval to become the committee bill. Shortly after the November meeting two members of the committee ceased to be railroad commissioners and, so far as I am informed, took no further action in the matter. A bill now in the hands of the secretary of the committee, Hon. Edward A. Moseley, has the approval of Mr. Rogers, of New York, Mr. Hill, of Virginia, and the subscriber, a majority of the committee, and all of the present active members thereof.

That you will report this proposed bill back to the Senate as the bill of your committee is respectfully urged.

For many years railroad employees have suffered accidents resulting in personal injury and death, largely for want of uniformity in the appliances used in handling cars. With the beginning of railway-car service, while the danger of the link-and-pin couper and the hand brakes existed, it is known to have been in a proportionately less degree, for the reason that both brakes and couplers were uniform or nearly so, and the trainman or yardman handling them always found the one that he handled to-day the same as that handed on yesterday. Inventive genius, however, ever active has produced a multiplicity of couplers, many of them of great merit and in use on the different lines, and this greatly complicated matters and increased rather than lessened the danger.

State legislation providing for safety appliances in several States followed these inventions and State commissioners in one State approve one type, in another a different type, and with each step intended to be in advance the danger grew alarmingly. What is the remedy? Uniformity; and with so large a per cent of the cars passing across State lines this uniformity will come most rapidly when provided for by Federal legislation. That it will cost money to bring about this reform is admitted, but in what direction can the Government make expenditures that will bring results more to be desired? The Government has a life-saving service doing duty on the coast; a grand and humane service it is. About $1,000,000 was expended on it last year and 350 lives saved, while 2,451 were killed last year in the railway service and 22,000 injured, and may not the General Government properly do something to decrease materially this terrible loss?

Many of the leading lines of the country are rapidly supplying their equipment with safety appliances but not all in the line of uniformity. Then there are other lines that are making but little, if any, progress in this direction. The remedy is Federal legislation to compel the dilatory roads to properly equip their cars or to use the alternative of paying the expense attending the transfer of tonnage from their cars to the equipped cars of other companies.

That the present trend of the strong lines is in the direction of uniformity and safety may be illustrated by the fact that the recent adoption of the Master Car Builders' type of coupler by the Boston and Albany Railway Company after much strenuous objection to it, because the action of the New York Central and other important lines virtually compelled such adoption. It is the obstinate manager and the manager of impecunious lines who stand in the way of progress in the direction of uniformity and safety, and to reach such cases is the strong arm of the law invoked.

It may be contended that the Interstate Commission now has authority to regulate these matters under its general powers of "inquiry into the management of the business," etc., but it has not so far in its work exercised that authority, nor is it likely to do so in the multiplicity of duties imposed upon it.

What is required is a law that will keep up the progress now being made, allowing a reasonable time in which the reforms are to be brought about, with sufficient elasticity to permit extensions of time in worthy and deserving cases, as is provided for in the English law of 1889 and followed in the bill formulated by the safety appliance committee, which is now before you for consideration.

We are passing through the transition period, with all its attending terrors, followed by increased fatalities and injuries, and any legislation that fails to provide for uniformity is a step backward. Uniformity in the drawbar, in the height of the car, and in all of its parts and attachments is of pressing importance and can not be given too much consideration.

SPENCER SMITH,
Commissioner.

I desire also to say that, on the invitation of the chairman of the committee, I requested members of all organizations of railroad employees to be present at this hearing. You have heard the representatives of two or three of them. Mr. Arthur, of the Brotherhood of Locomotive Engineers, was unable to be present. Yesterday Mr. Sargent, head of the Brotherhood of Locomotive Firemen, addressed the Senate committee, but was called away, and Mr. Wilkerson, head of the Brotherhood of Railroad Trainmen, whose monthly payments

for deaths and casualties exceed $30,000, while before the Senate committee, could not be here. All, however, are of the same opinion, I think, that it is simply a question of the best means of bringing about *uniformity;* for none of these representative men have undertaken to state what he believes is the proper type to adopt; that is a secondary question; it really seems to me there should be legislation which should leave the railroads, as far as possible, to first deal with the question themselves, and if they do not do it within a short time a commission ought to be appointed to examine into the whole subject and select a standard coupler or report to Congress.

Mr. KING. As you have taken these statistics for our committee, what is your opinion about the possibility of the railroads agreeing?

Mr. MOSELEY. I do not think the railroads will ever agree; but I do think it is but fair to them to give them an opportunity of doing so.

A MEMBER OF THE COMMITTEE. To a commission?

Mr. MOSELEY. Not necessarily. They could send their vote or expression to the Interstate Commerce Commission or any one that should compile it.

Mr. LIND. Suppose it was made illegal to use any but a standard coupler in interstate commerce after the lapse of a certain length of time—eighteen months or two years?

Mr. MOSELEY. That is too short, I think.

Mr. LIND. The time is immaterial; the principle is the same. Give them a certain period in which to agree upon a uniform coupler. Do not you think that would bring them to an agreement? What I want to put before you is the suggestion of Mr. Shaw on the subject, who preceded you.

Mr. MOSELEY. The difficulty is this: The railroads would then, under color of law, refuse to take cars unless they had couplers which exactly met their ideas, and would be so particular in regard to the matter that, for instance, traffic from the West instead of being sent through would be stopped and have to be shipped into other cars if the couplers were not of the kind to suit connecting lines.

Mr. LIND. Would that pay them?

Mr. MOSELEY. For a time it might. The difficulty attending it would be that the connecting road would say, "We can not afford to run the risk of paying for injured men in our employ, injured and killed in trying to couple your style of coupler with ours; so you must put on couplers to meet our views or we will not take the cars." If Mr. Crocker's suggestion were adopted you would give these roads an opportunity of settling the matter. I think it is really a question that needs investigation, and still at the same time I dislike to advocate anything that calls for an expenditure of the people's money. Yet, as the Government is spending $900,000 annually for the purpose of saving the lives of those men who go down to the sea in ships, it can certainly afford to spend an inconsiderable sum to relieve this trouble.

You have heard nothing in regard to other matters which are of equal importance almost. I refer to the driving-wheel brake and the continuous train brake, which are provided for in almost every bill introduced, for the reason that there is nothing to be said in opposition to the law which would require their adoption.

A MEMBER OF THE COMMITTEE. Do you want them included in the same bill?

Mr. MOSELEY. Certainly. Then there is another thing which has been urged by the men in the service and which can be easily settled. A great many accidents often occur from a lack of uniform height of drawbar from the rails. When a loaded and unloaded car come together it is extremely dangerous. To remedy that, I would recommend the passage of a law which would require roads after a certain time to establish uniform heights in accordance with the standard of the American Railway Association or some other standard. The road failing to do that, it should be the duty of the Interstate Commerce Commission to establish a uniform height with a maximum variation, and then make it unlawful for any railroad to use a car the height of the drawbars of which does not comply with these conditions at all times.

The difficulty is that these cars may go out all right, but they do not often get back for two or three years to the road by which they were built, and all the time they are getting down until at last they get away from the standard, and into a position in which it is impossible to couple them with those at usual height without using crooked links, and the difficulty of going in and doing this adds largely to the death roll.

Mr. HOUK. Can that difficulty be remedied?

Mr. MOSELEY. Yes, sir. They can so construct freight cars that there shall not be a variation of more than 4 inches whether loaded or unloaded. The cars are all right when they are built, but after awhile they get away from the usual standard, when instead of being sent to the shops for repairs they are allowed to remain in use, killing sturdy men and carrying destruction into every freight yard where they go. These people, of the highest types of the workingmen of this country, and their dependent mothers, wives, and children, appeal to you, representing them, in common with other classes of your constituents, to save them from unnecessary loss of life and mutilation of limb.

Mr. Chairman and gentlemen of the committee, I am very much obliged to you for the opportunity of addressing you.

STATEMENT OF L. S. COFFIN.

Mr. COFFIN. Mr. Chairman and gentlemen of the committee, I must at first appear in the disagreeable position of being egotistical. I want to state my position, as nobody has introduced me here, to show how I stand on the subject under discussion. For five years I was one of the railroad commissioners of Iowa, and while on and after going out of that commission I became greatly interested in the terrible slaughter and maiming of railroad men in freight yards. I have devoted myself to the study of this subject, as perhaps no other man in the United States has done, to find out if something could not be done to prevent this loss of life; and I stand here to-day in the position of laboring for these men, and for these men alone. I showed the chairman of the committee my credentials from the Brotherhood of Railroad Trainmen giving me absolute authority to act for them. They number in their order some 22,000 practical railroad men, mostly brakemen. Now, I want to speak, for the information of several gentlemen who have not followed the matter, about what has been done by Congress.

I want to say that during the last Congress a bill was introduced and carried through committee with a favorable report for the passage of a law of this kind. The bill is word for word the same as the bill Mr. Lodge has introduced this Congress. That bill has been the subject of much study by me. It has also been introduced by Mr. Henderson, and in the Senate by Senator Allison. I want you to read that bill (No. 117), because it will be before you. There are four or five bills of this character sent to the Committee on Railroads and Canals, and some of them are here, having the same object in view. In the report of the committee made last Congress you will find that the officers of the Brotherhood of Railroad Engineers sent a letter to the committee approving of and asking for the passage of a bill of that character. And you all know the power and influence of the Brotherhood of Railroad Engineers. The bill was sent to them for examination and they sent it back with their approval and asking for its passage. It was also sent to the grand officers of the Brotherhood of Locomotive Firemen, and their letter is embodied in the report of that committee.

The Order of Railroad Conductors of this nation, in their convention at Rochester, passed very pertinent resolutions in regard to that bill, asking Congress to enact it into law. The Brotherhood of Railroad Firemen—there are 22,000 members in that order—are unanimous in asking for legislation upon this point. You have asked almost every one that has appeared before you, "What plan have you to suggest to accomplish this work?" Gentlemen, if you will look into that bill I think you will find an answer to that question. I refer to Col. Henderson's bill. I should like to call your attention to the 6th section of that bill.

Mr. LIND. Is that bill before the Committee on Railways and Canals?

Mr. COFFIN. I think it was referred to this committee also.

The CHAIRMAN. It is referred to this committee.

Mr. COFFIN. Then I am very glad, and I am in place in speaking about it. I meet very largely with railroad managers, railroad solicitors, and railroad men generally, and have taken suggestions from them; and when I have not taken suggestions from them I have sometimes taken hints. A great many of them have said to me, "Any bill that we have seen we could drive a coach and four horses through," they contain so many loopholes. Now, in regard to the word "automatic," what does it mean? The word "automatic" is not found in the bill. Let me read section 6:

> The main design of this law being this, namely, greater safety to employees in handling cars and running trains which may be engaged in moving interstate commerce, it requires all persons, companies, or corporations owning or using such cars and trains to adopt a uniform system of coupling and uncoupling such cars, and it enforces upon all such parties engaged in interstate commerce the universal use on all their cars of the standard type of safety couplers as established by the majority of such persons, companies, and corporations through the American Railway Association.

Now, the idea I had there is this: If a majority of the railways of this nation adopt a standard coupler,then I want Congress to reinforce their recommendation and make all railroads adopt it in order to have a uniform system of coupling cars. If the American Railway Association, that controls three-fourths of all the miles of railroad in this

nation, express themselves in favor of a settled policy, and put upon all new cars and all repaired cars a certain type of coupler, it seems to me that the way is open for Congress to say to the rest of the railroads, "You must adopt the standard coupler in order to secure uniformity."

A MEMBER OF THE COMMITTEE. But that association has not agreed upon a coupler, has it?

Mr. COFFIN. Yes, sir; it has. Last fall, by a vote of 50 to 2, they adopted the report of their committee on safety appliances, which recommended the adoption of this type of coupler, and it is there on record. In my former bill I put in the standard adopted by the Master Car Builders' Association, and declared that that should be the standard in force. Gentlemen, will you bear with me and let me give you the history of the master car builders' work? These men are to the car what the engineers are to the railroad. They say how a car shall be constructed. The master mechanics control the motive power. These two associations have agreed to adopt this type of coupler. In their annual convention in Minneapolis, by a two-thirds vote, after long years of experiment, and after having a committee for the purpose of ascertaining the most practical and safest coupler, they reported in favor of a certain type of coupler. Now, according to a rule of that association, when an important step like that is taken, it is submitted to the roads represented in the association, and about 90 per cent of all the roads were represented there, and indorsed their action.

So these roads themselves, of their own motion, have done just what we all want and what you want, and now all that is needed is that that action shall be reenforced by law; that all shall be compelled to adopt this standard. Col. Haines informed you that the moral force of these leading roads adopting a standard will compel the others to adopt it, by their saying, "We will not take your cars unless they have the standard coupler." But in order to do this the roads will have to have different managements from what they ever have had. The Standard Oil Company had not a safety coupler on a single tank car that it owns, and what road has the backbone to say, "We will not take your traffic unless you have such and such cars?" Competition is so strong that these cars will go on and the men will have to die. Now, if you will read Col. Haines's talk when you have it in print before you, you will see between the lines all the way through this thought, "Gentlemen, I wish you would pass a law so that we can be reenforced."

Now, that is just the position they are in. The railroads do not want to be put in the position of coming here and asking for legislation. The railroads oppose legislation, but there is little opposition to legislation of this kind now. Now, let me say what was done in my own State of Iowa. Two years ago we passed this same bill only adapted to State purposes, and it is in operation and working admirably. Mr. Hewitt, president of the Chicago and Northwestern Railroad, said to me only two weeks ago that the benefits accruing from the change more than paid all the expenses of it. Nebraska copied and passed the same law, and the roads running through Iowa and Nebraska are putting on those automatic couplers. Some gentlemen said something about the Illinois Central Railroad. The Illinois

Central Railroad do not take a single new car now unless it is equipped with automatic couplers and power brakes. The Chicago and Northwestern do not. The Milwaukee and St. Paul do not. The road represented by Mr. Wright, the Chicago, Rock Island and Pacific, do not. The general superintendent of his road said to me recently, "The progress is going on grandly," and, gentlemen, you need have no fear of injuring the railroads in this matter. That same general superintendent, Mr. Roy, said to me, "Mr. Coffin, so great an advantage is it to have these safety couplers and power brakes, that if I found I wanted 1,000 more freight cars for our business and our directors could not give us more than 800 so equipped, I could do more business with these 800 than with 1,000 of the old style."

Mr. MALLORY. What is the American Railway Association type?

Mr. COFFIN. The Master Car Builders' type, and I am glad you called that up. The Master Car Builders' Association, after the vote at Minneapolis, instructed a committee to take a vertical plane hook or coupler of some kind and study and improve it so as to make it better. They took the Janney coupler, and found on investigation that changes would have to be effected before it could be made to conform to the standard; and also that certain patents existed upon the contour lines. They went to the owner of those patents, and he surrendered the patents in question to the Master Car Builders' Association. Then they drafted what they call the contour lines of that coupler, and announced to the world that any vertical plane hook coupler that conformed to these contour lines and would couple with the link-and-pin by hand and other hook couplers, automatically, should be called a standard coupler. Now, we had yesterday, before the Senate committee, and we have here to-day, men who have been engaged in the work of coupling cars, and who have said that the Master Car Builders' couplers will not couple under certain conditions. And why? Because some of the makers of these couplers thought that they could improve upon the Master Car Builders' draft, and they changed the contour lines. When these couplers meet the Master Car Builders' couplers they will not couple, and that is where the difficulty is.

At the last meeting of the Master Car Builders' Association this matter came up and was discussed at length, and they decided to make steel patterns showing the contour lines agreed upon by the association. These patterns will be sent to the different manufacturers of these couplers with information that couplers which do not conform to those requirements will not be regarded as be'onging to the Master Car Builders' type, and railroads will be advised to put them on. And right here let me say that the general manager of the Chicago and Northwestern Railroad Company said to me the other day, "Mr. Coffin, we have got one of our lines now equipped entirely with power brakes and safety couplers and there is now *absolutely no breakage* at all."

Mr. WRIGHT. What coupler do they use?

Mr. COFFIN. The Master Car Builders' type; they are making them in their own shops.

Mr. STORER. It is claimed that while the Master Car Builders' type is automatic on a straight road they are not automatic on sharp curves.

Mr. COFFIN. It has been my privilege to attend quite a number of practical coupler tests by experts, and the Master Car Builders' couplers, where they conform to the contour lines as established by the Master Car Builders' Association, will couple in every conceivable position required in the traffic of a railroad. It is because some have varied from these contour lines that this trouble has arisen.

Mr. LIND. Are the proceedings of the Master Car Builders' Association printed and can we get copies of them?

Mr. COFFIN. Yes, sir; and I think they can be sent to you.

Mr. LIND. I want to say, in regard to the statement that the Sault Ste. Marie Railroad has discarded the use of safety couplers, that two-thirds of its traffic consists of Canadian Pacific cars, and it would not be practicable for them to use a coupler that did not work well with Canadian Pacific cars. I do not know whether that is the reason for their abandoning safety couplers or not, but it struck me that it might be the reason.

Mr. COFFIN. I want to say why I am so earnest in this matter. There never was a period in the railroad history of this nation when there was so great an approach to uniformity as there is at present. As has been well said, the link-and-pin coupler is bound to be got rid of. There is no question about that. That is a fact which has to be looked at squarely in the face. The link-and-pin coupler has been in use ever since railroads have been in use, and we have always been killing men. Gentlemen, I do want each of you to take to your rooms and read at home the last report of the Brotherhood of Railroad Firemen. It shows that the monthly payments to members for total disability run as high as $40,000 per month, and when I tell you that only about one-third of these men are in these orders you can estimate what would be the amount for total disability if all were in.

Now, about the brake, in regard to which but little has been said. It is, however, a most important matter, as twice as many fatal accidents occur on this account as on account of the coupler. And when Col. Haines says that they have not arrived at that point where they are certain in regard to the practicability and utility of the power brake on freight trains I shall have to differ with him, although he is vice-president of a large system of railroads. But I know, in ways that Col. Haines never went through, that the power brake is practical and applicable to freight cars. For six long weeks I was with a number of experts—master car builders, and master mechanics—testing brakes, and I have seen a train going down grade at a rapid rate of speed—40 miles an hour—brought to a standstill within 500 feet after the signal was given as gently and as smoothly as an ordinary train draws up to a station. Every practical railroad man will admit that with 20 per cent of the cars in a freight train equipped with the power brake the engineer can control the train far better than three of the best brakemen on earth. They can do it perfectly and with safety to the train and the men. It is only in the case of an emergency that Col. Haines objects to its use, when you are running at a rate of 45 or 50 miles an hour and you catch a glimpse of another train on the same track. Then when you stop suddenly the last cars come up against the front car and do damage. That, however, is only on the occasion of an emergency stop, and it is only one case in a thousand when such stops are made.

A MEMBER OF THE COMMITTEE. What is a power brake?

Mr. COFFIN. It is the same brake as they have on passenger cars, and is controlled entirely by the engineer. Now, gentlemen, I do hope that you will take speedy action in this matter. If you should appoint a subcommittee upon the subject I will go before it at any time and give you all the help I possibly can.

The CHAIRMAN. We have a subcommittee upon this subject.

Mr. COFFIN. Then I shall be glad to go before it and give you figures or anything I can to help you. The moment that you pass some national law, if it is anything in reason, that moment you will give a spur to the roads to take action they will never take until you do. The progressive roads, however, are doing grandly. You all recollect that terrible accident at Christmas on the New York Central Railroad. A little while ago I went to the general manager of that road and asked him what was the initial cause of that accident, and he replied that he did not know. I said that I understood that the freight train broke in two, and he said, "Yes, it did." Then I said, "Can you tell me what the coupler was that broke in two?" "No, I can not," he answered; "but that is a very important thing," he continued, "and I wonder that we did not think of it before."

An order was issued for a report to be made on this point, and it was found that the coupler which broke was a link-and-pin coupler, and one of the reasons why the railroads want to get rid of this link-and-pin coupler is the fact that they are everlastingly breaking in two and causing such wrecks. The public is deeply interested in this question. If that train had been equipped with proper safe couplers such an accident could not have happened. From my experience for five years in Iowa investigating these matters 50 per cent of all these wrecks could be avoided if the engineer by a turn of his wrist could apply the brakes instead of having to call on the brakemen to get out on the top of the cars. The importance of this will occur to you as you study it, and I shall be very happy to help you all I can. I thank you for your attention.

The committee was then adjourned.

MARCH 4, 1892.

STATEMENT OF MR. ALLEN R. BUSHNELL.

Mr. ALLEN R. BUSHNELL. Mr. Chairman and gentlemen of the committee, I should like to be heard for a few moments in regard to bill No. 3154.

Mr. PATTERSON. I believe that is one of the bills we have already discussed some four or five hours.

Mr. STORER. And the matter is pending before the subcommittee now.

Mr. BUSHNELL. What members are on that committee?

The CHAIRMAN. Mr. O'Neill, of Missouri, Mr. Mallory, and Mr. Lind.

Mr. BUSHNELL. I see two of the gentlemen are present. Mr. O'Neill, of Missouri, is not here. What I wish to say, however, will be short.

Mr. MALLORY. Have you given consideration to the question of the right of Congress to make the conclusive evidence of liability provided for in your bill? You say that the fact that a car is not provided with such safety coupler shall be conclusive evidence of such liability. The Constitution says a man shall not be deprived of life, liberty, or property without due process of law. Is not that in conflict with the Constitution?

Mr. BUSHNELL. No, sir; I think not. It is only a rule of evidence.

Mr. PATTERSON. But can Congress make a conclusive rule of evidence? That is the question. Would not such a rule deprive a citizen of his day in court?

Mr. BUSHNELL. No, sir. It says a certain fact shall be conclusive evidence. Now, it is a well-settled principle of law——

Mr. LIND. It goes further and says it shall be conclusive evidence of liability.

Mr. BUSHNELL. The only fact for determination by evidence is the amount of damages. The fact that I shoot a man is conclusive evidence, taken by itself, without any other facts, that I committed murder—that I committed a crime.

Mr. PATTERSON. But you can not say it is conclusive evidence that you committed homicide.

Mr. BUSHNELL. That taken alone should be conclusive evidence of a crime of some kind. The only point here made in this bill is this, that the fact of an insufficient coupler being there shall be conclusive evidence that the railroad is in the wrong in that respect, and conclusive evidence of liability. It is simply the application of the well-known principle of estoppel. This fact existing, the railroad company shall be estopped from saying that they are not guilty of neglect. Just as if Mr. Lind is about to purchase a farm from Mr. Mallory and he asks me, as agent of the land, "Is Mr. Mallory the owner in fee of this land," and I say, "Yes, you can make the purchase," and he does so. I am estopped forever from coming into court and denying that Mr. Mallory was owner of that farm, the title of which was in me.

Mr. LIND. But you are not estopped from denying my assertion that you made such a statement. It is only on proof that you made such a statement that the law estops you.

Mr. BUSHNELL. The fact as to whether an estoppel exists is always open to inquiry. So also is the fact as to whether there is an automatic coupler on the car which causes a death or injury, but it being established that there was no automatic coupler forever estops the company from saying that they are not guilty of neglect.

Mr. MALLORY. No matter how negligent the employee himself has been?

Mr. BUSHNELL. No; if the party has brought the injury on himself that is another question.

Mr. MALLORY. But you are shutting the railroad off from showing it. Take the case of a man who committed suicide; if the car which killed him did not have an automatic coupler, would that be conclusive evidence of liability?

Mr. BUSHNELL. No; it would not apply in that case. It would not shut the railroad company off from showing that the injury was the consequence of the injured man's own act and that it was not at fault. But if the injured man is employed in the lawful business of coupling

cars, and doing it lawfully as an employee of the railroad, to make this rule stringent I said "conclusive." I will say to the committee however, that I debated for some time whether to use the words "prima facie" or the word "conclusive," and I will explain to the committee why I said "conclusive." The committee perhaps have observed the reports of railroad companies in relation to the number of employees killed and injured. I do not know whether this has been called to your attention or not, but it is a great evil, and one which the President in his message calls the attention of the country to. There were killed last year——

Mr. COOMBS. We have had all that. I would suggest that Mr. Bushnell be requested to read the report of our hearing on this subject, so that he may see what has already been brought to the attention of the committee. We spent four or five hours listening to speeches on this subject the other day.

The CHAIRMAN. I will state to the committee that the report of the hearing will be ready for distribution, Mr. Moseley says, to-day, so that we will have it without further delay.

Mr. COOMBS. I suggest that Mr. Bushnell read over that report, and if he has anything to add he be accorded the privilege of coming before the committee again. I think we all appreciate the necessity of doing some active work in this matter.

Mr. BUSHNELL. I do not wish to occupy the time of the committee unnecessarily, and as you have had these matters brought to your attention before it is not necessary for me to repeat them. But when it appears that the killed and wounded employees of railroad companies exceeds every year the number of killed and wounded in some of the great battles of the world it seems to me time to pass some stringent laws on the subject. But, of course, in regard to the discussion of this subject I will accept the suggestion of Mr. Coombs.

STATEMENT OF MR. MOSELEY.

Mr. MOSELEY. Mr. Chairman and gentlemen of the committee, I shall not occupy more than five minutes of your time, as I see Mr. Crain is anxious to appear before the committee, and shall be as brief as possible. The committee have very generously given a good deal of time and have taken great interest in the discussion of the car-coupler question, and I desire now to call your attention to but one or two facts. In the course of the arguments made in the presentation of this subject to the committee there are certain things which have been proposed by the friends of this humanitarian measure which have met with no opposition. One is a standard height of drawbars from the rail. There should be a maximum height of drawbars, simply allowing a small variation between cars loaded or unloaded—a maximum variation which should not be varied from.

Now, that is a point which no one who appeared before the committee, here or elsewhere, has ever offered any objection to. By the establishment of this maximum variation there would be no more riding of one drawbar over the other, which would result in the saving of a great many casualties. This is a reform which can be effected almost immediately, as it is one which the railroads of the United States can put in force within ninety days after the passage of the law. I call your attention to this point in order that you may give

it your careful consideration. Provision has been made for this in section 10 of a bill (S. 893) introduced by Senator Cullom in the Senate, which is as follows:

SEC. 10. That within ninety days from the passage of this act the American Railway Association is authorized hereby to designate to the Interstate Commerce Commission the standard height of drawbars for freight cars, measured perpendicular from the level of the tops of the rails to the centers of the drawbars, and shall fix a maximum variation to be allowed between the drawbars of loaded and empty cars. Upon their determination being certified to the Interstate Commerce Commission, the Commission shall give notice of the standard fixed upon, at once, to all common carriers, owners, or lessees engaged in interstate commerce in the United States, by such means as the Commission may deem proper, and thereafter all cars built or repaired shall be of that standard: *Provided, also,* That after six months from said notice no cars shall be used in interstate traffic which do not comply with the standard above provided for, either loaded or unloaded. Should said association fail to determine a standard as above provided, it shall be the duty of the Interstate Commerce Commission to do so.

Then there is the question of driving-wheel brakes, and no objection has been urged against that. Next comes train brakes, and that has met with no opposition on the part of anyone.

Mr. COOMBS. That does not apply to every car in the train?

Mr. MOSELEY. No, sir; only to a sufficient number of cars to obviate the necessity of men traveling on the tops of cars to handle the hand brakes in controlling the train. Now, the Atchison road, which has not a Master Car Builders' coupler on any of its cars, has a very large proportion of them equipped with train brakes; the use of them will save a great number of lives and prevent a large number of accidents. No one has appeared here to urge any objection to the passage of the law which will require the companies to equip their cars with train brakes; I have called the attention of the committee only to those matters about which there is no dispute.

Now, in regard to the question of the automatic coupler, particular stress has been laid upon the great difficulty which would be experienced in securing the adoption of a standard uniform coupler. It would appear to me that the sixth section of the proposed bill handed you by Mr. Crocker fully covers that matter in making it the duty of the railroads to express their preference for some particular coupler within a short period. The section provides "That on or before the 1st day of July, 1893."

Mr. COOMBS. That is too long.

Mr. MOSELEY. I think so, too.

Mr. LIND. We can fix that. We simply want your idea.

Mr. MOSELEY. My idea is that it should not be left to the American Railway Association to determine what the uniform standard coupler shall be.

Mr. PATTERSON. What has been the fate of your bill in the Senate?

Mr. MOSELEY. There has been no bill yet reported before the Senate committee.

Mr. O'NEILL (Pennsylvania). Are all the railroads connected with the American Railway Association?

Mr. MOSELEY. No, sir; and I ask the committee to take that fact into consideration and adopt some system by which every railroad in the United States engaged in interstate commerce will be given the opportunity of expressing their preference in regard to any particular

style of coupler, there being no difference in opinion as to the standard height of drawbar from rail. I would allow the American Railway Association to fix that, as they have ever done, as far as they can control the matter.

Mr. O'NEILL, of Pennsylvania. What is the purpose of these other railroad associations? The Eastern Railroad Association, for instance?

Mr. MOSELEY. The Eastern Railroad Association is an association that employs a lawyer in Washington to see that these interests are looked out for in patent affairs.

Mr. O'NEILL, of Pennsylvania. Their duties are not in regard to railroad legislation?

Mr. MOSELEY. No, sir. Having spoken to you of the matters about which there is no dispute, I desire to call your attention to one other fact. As secretary of the committee of which you have heard, I sent circulars to the presidents of every railroad in the United States asking them to state, among other things, In what way, in your opinion, the equipment of freigh cars with uniform automatic couplers can best be hastened? and seventeen railroads, representing some 11,000 miles of road, stated that they believed, by the adoption of the Master Car Builders' type of coupler, though I received replies from railways representing 125,000 miles of road. I have no views to express on the merits of any coupler, but after hearing and learning of the great diversity of opinion expressed by the railroad managers and employees and others interested, as I believe, from purely philanthropic motives, as is Mr. Coffin, of Iowa, I would urge upon the committee not to report any measure which would legislate in favor of any particular type of coupler. Such legislation, it seems to me, would not be fair to all interested in inventions, to the railroads as a body, or to the men employed.

Mr. COOMBS. Your idea is to make the railroads decide upon the coupler?

Mr. MOSELEY. Yes, sir. I would make them decide upon a coupler which would meet the requirements as to use in every bill prescribed here. There is just one other matter of which I wish to speak. It was called to your attention the other day by Mr. O'Neill, of Missouri—that is the matter of grab-iron handles or something of that sort. Members of the Master Car Builders' Association have, I understand, recommended at their meetings that freight cars should have a hand hold, or something that the switchman can take hold of if he slips when between the cars, instead of trying to clutch hold of the side of a perhaps icy car.

This, I believe, is a most important matter, now that the car coupler is in a transition state, and the men are being constantly called upon to couple different types of couplers together, necessitating their going between the cars more than ever, and vastly increasing the risk, the very thing which all the representatives of the men who have been before you complain of. Until uniformity is brought about, until every car in the country is equipped with a coupler that interchanges perfectly and automatically with every other coupler in use, will this increased risk continue. It is an inevitable fact that many a poor fellow will lose his life or limb before uniformity is reached. It is a necessary sacrifice to the switchmen and trainmen who is to come

after him. But this sacrifice should be minimized to the utmost possible extent by every effort which Congress and the railroads can make.

Mr. O'NEILL (Pennsylvania). Have you any statistics as to the number of cars to which automatic couplers would have to be applied?

Mr. MOSELEY. There are about 100,000 freight cars in use in the United States. The passenger cars are all equipped with automatic couplers and are worked from the platform. Mr. Chairman and gentlemen of the committee, I do not now wish to take up any more of your valuable time, and I thank you for the hearing you have accorded me.

Mr. COOMBS. I move that the whole matter be referred back to the subcommittee with instructions to embody the ideas tacitly agreed upon in the whole committee into a bill to be submitted to the whole committee as soon as possible.

Mr. O'NEILL (Missouri). That measure is now in the hands of the subcommittee, and that committee is hard at work upon it.

Mr. COOMBS. My information was that the full committee invited these gentlemen to appear before it to be heard.

Mr. O'NEILL (Missouri). The bill is not before the committee. The subcommittee are exercising all the energy necessary, considering the size of the subject, the importance of the subject, and the difficult features of the subject. Of course we have met a good many gentlemen who are thoroughly satisfied that they undersand it all, and it will take a little time for us to absorb and digest the information we have had given to us.

Mr. COOMBS. We had the matter before us this morning, and I suggest that if there are to be any further hearings they will be before the subcommittee, and that they perfect a bill and bring it before this committee.

Mr. O'NEILL (Missouri). I am very anxious to get all the information possible on the subject, and I know the other members are. I do not propose to commit this committee, unless it should be absolutely necessary, to any particular line of patents. I think we are interested more in saving life than in advancing the interests of patentees. I have endeavored to get all the information I could from the heads of railroad systems and from employees, recognizing the fact that this committee will certainly take action and report a bill to the House, and that we ought to have a most perfect bill.

Mr. COOMBS. There has been a general expression of sentiment here that we should not in that bill establish any particular coupler as a standard, but that the railroads should be given a certain time to agree upon a coupler which will be satisfactory to the Interstate Commerce Commission.

Mr. O'NEILL. You heard the discussion before the committee. I was not here during the whole of that discussion, and report of it has not yet been received. We are doing all that we can to advance the matter. Do not crowd us and we will do the business as soon as possible.

Mr. COOMBS. These people are coming constantly before us, and I simply desire to suggest that in future they be heard by the subcommittee.

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AUTOMATIC COUPLERS AND POWER-BRAKES.

HEARINGS

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BEFORE THE

COMMITTEE ON INTERSTATE COMMERCE,

UNITED STATES SENATE,

IN RELATION TO

SAFETY COUPLERS AND POWER BRAKES OF FREIGHT-CARS.

Nos. 82 & 87, O. T. 1904,
Johnson v. S. P. Ry

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1890.

AUTOMATIC COUPLERS AND POWER BRAKES.

HEARINGS BEFORE THE COMMITTEE ON INTERSTATE COMMERCE, UNITED STATES SENATE IN RELATION TO AUTOMATIC COUPLERS AND POWER-BRAKES ON FREIGHT-CARS.

WASHINGTON, D. C., *April 30, 1890.*

The committee met at 10 o'clock a. m.

Present: Senators Cullom (chairman), Platt, Blair, Wilson, Hiscock, Harris, Reagan, and Barbour.

The CHAIRMAN. We will hear Mr. Coffin now.

STATEMENT OF MR. L. S. COFFIN.

The CHAIRMAN. What is your full name?

Mr. COFFIN. L. S. Coffin.

The CHAIRMAN. You are aware that there are three separate bills before the committee, one of which was introduced by the Senator from Massachusetts, Mr. Hoar; one by the Senator from Iowa, Mr. Allison, and the other by myself, of which you have copies, I believe.

Mr. COFFIN. Yes, sir.

The CHAIRMAN. All looking to the adoption of automatic couplers, etc. You can address yourself to the subject as specifically as you desire.

Mr. COFFIN. The very fact, Mr. Chairman and gentlemen of the committee, that a bill has been introduced by the honorable chairman of this committee will embarrass me somewhat.

The CHAIRMAN. You need not be embarrassed about it at all. Say what you please about it, without any reference to where the bill comes from.

Senator HARRIS. We want your opinion wholly independent of the provisions of any pending bill.

Mr. COFFIN. That is what I want to give you.

The CHAIRMAN. And whatever defects you may discover in any one of the three bills please state.

Mr. HARRIS. Criticise them with the utmost freedom.

Mr. COFFIN. The bill presented by Senator Allison is the result of several years of very close investigation with experimental trains and of very intimate relations with railroad experts on my part. That is the bill I want to bring most forcibly before you, and I will take the liberty, as you have given it to me, to speak what I apprehend to be the defects of the other bills.

It may be necessary for me, in order to emphasize what I have to say, to lay before the committee some of the terrible facts that confront us.

The CHAIRMAN. We would be glad to have them.

Mr. COFFIN. The statistics, and especially the report of the Interstate Commerce Commission, will give all that I need. The statistics show that in this nation there are not less than some thirty-two or thirty-three thousand railway employees either killed or mangled, more or less, for life—crippled in their daily work.

The CHAIRMAN. In a year?

Mr. COFFIN. Yes, sir; yearly. It is difficult to arrive at the exact number injured by the link-and-pin coupling and the hand brake, which will be the two points that I want to make here.

My estimate makes it something like over 7,000 in this nation every year who are either killed or crippled for life from those two causes alone, and I will give you the basis of that estimation.

The law providing for the Iowa railway commission went into effect in 1878. I joined it in 1883 and left it in 1888. We commenced the report when we had about 4,000 miles of road, and we had 8,000 miles in 1888. The law requires the railroads to report to the commission all these casualties. Those ten years show that 2,426 of our young men in our State on that average of 6,000 miles of road were killed or crippled by those two causes. The report for 1888 shows that 354 were killed. Now, taking that as a basis—we have 8,000 miles of road in round numbers, and there are 165,000 miles in the United States—taking that as a basis, that gives us 7,080 from these two causes alone in this nation.

Senator BLAIR. You do not mean 7,080?

Mr. COFFIN. Yes, sir; 7,080 in this nation.

Senator BLAIR. It must be 27,080.

Mr. COFFIN. I am speaking of the two causes alone, not taking any other accidents.

I have in my hand two or three pages of the last report of the Kentucky commission, and in dwelling on this particular matter the commissioners say:

> In this State the number of accidents from the causes under consideration—

That is the link and pin coupling and the hand brake—

> in proportion to railroad mileage is greater than in Iowa. We report 286 accidents on 14 roads, having a mileage of one-fourth the Iowa railroad mileage, and yet are but 66 behind the Iowa record of last year in injuries to brakemen from the two causes in question. This indicates the estimate based on Iowa returns to be much below the fact.

Taking the estimate in Kentucky, it gives us the enormous number of 22,000 people in this nation crippled and killed by those two causes.

Senator HARRIS. The two causes you refer to are the ordinary couplers and hand brakes?

Mr. COFFIN. Yes, sir; those two causes alone. I shall confine myself to those two causes alone.

Senator REAGAN. What do you mean by hand brakes?

Mr. COFFIN. Those are the brakes to operate which it requires the men to go on top of the cars. In the report of the commissioners you will find that a great many accidents occur, such as "falling from trains," or "struck by overhead bridges." It is because the men have to be on top of the cars.

Senator BLAIR. Do you confine yourself to freight cars?

Mr. COFFIN. Yes, sir; freight cars entirely. You never see an account of a boy being killed by a passenger car.

The CHAIRMAN. I believe the bill does not go beyond freight cars.

Mr. COFFIN. It does not.

Here is another very interesting matter. I stand here as the spokesman of the Order of Railway Brakemen. I have a full commission in my pocket to act for them in all matters of safety appliances. At their national convention, their sixth annual convention, at St. Paul, last fall, an estimate was made. That is the end of their fiscal year. Their average for that year was about ten thousand, and the maximum sum that they pay out for disability is $1,000. Those boys, on an average of a little less than ten thousand, last year paid out a quarter of a million dollars for disability out of their hard-earned wages. This year their number is such that they will have to pay out over a half a million dollars for disability. Three-quarters of that comes from this coupling of cars and the using of hand brakes.

Now, there is a wonderful fact.

The CHAIRMAN. What report have you there?

Mr. COFFIN. I have the last report of the Interstate Commerce Commission, from which I shall quote pretty freely soon.

That is all I need to say. Just keep this in your mind, gentlemen, that in this nation, from those two causes alone, at least twenty families a day have to have either the undertaker or the surgeon. What that means, you can realize better than I can tell you.

Now the remedy. I apprehend that this bill which was introduced by Senator Allison will meet this, and it is the only bill that will meet it at once.

Senator HARRIS. Before you proceed to the remedy, let me inquire if you have any statistics showing what portion of these injuries result from coupling and what proportion from the use of hand brakes?

Mr. COFFIN. I could have had that from the Iowa reports if I had thought that that question would have been asked.

Senator HARRIS. Can you not give us your recollection as to the general facts?

Mr. COFFIN. The injuries received are greater from the couplings. The fatalities are greater from the brakes. We find in our reports in Iowa that about one in three is killed in accidents from brakes; that means of the men who handle the brakes one in three is killed when accidents occur from that cause. I will place in the hands of the chairman those estimates.

Allow me just one minute more to emphasize this. The other morning when you took up your daily papers and learned of that terrible calamity which had visited Louisville, you were all shocked; the whole nation was anxious and ready to give relief.

Let me say that every month in the year there are more of these strong young men cut to pieces than were persons killed in all that terrible calamity at Louisville. The public does not realize this. They drop here and there and everywhere. You do not realize it. Here I have grouped together just a month's work of this kind. I will leave one with you when I have finished.

The CHAIRMAN. You had better give a copy of it to the stenographer, so that it can be incorporated in your remarks.

The statement is as follows:

[Taken from the Railway Age.]

THE TERRIBLE RECORD FOR ONE MONTH.

FEARFUL SACRIFICE OF LIFE AND LIMB SUFFERED BY THE RAILROAD EMPLOYEES.

One hundred killed and one hundred and thirty-six crippled for life between October 19 and November 23, 1889.

Of these forty were killed by brakes and couplers and nineteen more mutilated. "Falling from trains" comes from being on top of cars to handle brakes. Read the terrible record below.

Bear in mind this is going on all the time, and we do not get over one-half of the facts. While the fatal link and pin and hand brake were doing their terrible work of death, the ordinary accidents in railroad work killed sixty others and injured one hundred and seventeen more.

But our present business is with the old common link and pin coupler and hand brakes, for their deadly work can be stopped.

Here is their work. Read:

[Railway Age, November 1, 1889.]

W. O. Hopkins, fireman Nashville, Chattanooga and St. Louis, was thrown from the top of a train at McEwen, Tenn., October 19, and was mangled to death beneath the wheels.

T. F. Higgins, brakeman Missouri Pacific, fell from a moving freight train near Leavenworth, Kans., October 20, and was run over and killed.

F. M. Crosby, switchman Central of Georgia, fell under a train while switching cars at Savannah, Ga., October 20, and had one leg crushed.

John O'Neil, brakeman Pennsylvania Railroad, was thrown from a freight train and instantly killed near Beattys, Pa., October 21.

William Dowe, brakeman Mobile and Ohio, fell on the track while coupling cars at Whistler, Ala., October 22, and was run over and killed.

M. J. Whitworth, brakeman Nashville, Chattanooga and St. Louis, fell between the cars at Murfreesboro, Tenn., October 22, and was run over and had both legs crushed.

C. E. White, brakeman Chicago and Alton, fell between the cars at Higginsville, Mo., October 23, and was run over and instantly killed.

G. T. Ragan, a brakeman, was run over and killed while coupling cars at Monticello, Ill., October 26.

James Crow, brakeman Wabash Railroad, fell from a train at Galesville, Ill., October 26, and broke his leg.

Frank Dubois, brakeman Southern Pacific, was probably fatally crushed between the bumpers while coupling cars at Oakland, Cal., October 19.

M. F. O'Mally, brakeman Chicago, Milwaukee and St. Paul, was struck by a bridge near Tomah, Wis., October 25, and was instantly killed.

Nicholas Haley, a switchman, was run over and killed by the cars at Quincy, Ill., October 25.

James Swift, brakeman Louisville and Nashville, fell from a car near Graceys, Ky., October 24, and was badly hurt.

Frank McPhee, switchman Burlington and Missouri River, had his back seriously injured while switching cars at Alliance, Nebr., recently.

William Norman, brakeman Northern Pacific, fell from a freight train near Helena, Mont., October 22, and was killed.

D. W. Du Puio, brakeman Montana Central, was precipitated from the top of a freight train by the giving way of the brake chain near Gallatin, Mont., October 23, and was fatally injured. He died several hours after being removed to the hospital.

Charles White, brakeman Northern Pacific, was seriously injured by falling from a freight car at Helena, Mont., October 23.

Dennis Welsh, flagman Little Miami, was seriously injured by being struck by an engine at Columbus, Ohio, October 24.

Levi Ronco, switchman Northern Pacific, was run over by the cars, and had his arm taken off at Dickinson, Dak., October 22.

James Gunn, switchman Chicago, Rock Island and Pacific, caught his foot in a

frog while switching cars at Armourdale, Kans., October 22, and was run over and instantly killed.

Charles Smock, brakeman Denver, Texas and Fort Worth, met with a painful accident while coupling cars at Colorado Springs, Colo., October 25. A piece of metal flew off the timber and struck him in the right eye, completely destroying the sight.

[Railway Age, November 8, 1889.]

W. B. Bowlin, brakeman Nashville, Chattanooga and St. Louis, fell under a train while switching cars near Decherd, Tenn., October 23, and had one leg taken off.

A brakeman named Davis, on the Kansas City, Wyandotte and Northwestern, was run over by the cars at Seneca, Kans., October 17, and had one leg severed

Isaac Dick, brakeman Pennsylvania Railroad, had a leg crushed by being run over by a freight train at Greensburg, Pa., October 28.

Michael Fox, brakeman Cleveland, Cincinnati, Chicago and St. Louis, was thrown from the top of a freight train by the breaking of a coupling, near Cincinnati, Ohio, October 29, and was seriously injured.

Ira Reed, flagman Baltimore an Ohio, was run over and killed by a train at Columbus, Ohio, October 29.

Frank Walker, brakeman Cenrtal of Georgia, died October 30 from injuries received a couple of weeks before by being run over by a freight train.

George P. Berry, freight brakeman San Antonio and Aransas Pass, was crushed to death between the cars at Muldoon, Tex., November 1.

Clarence Wainwright, brakeman Pennsylvania Railroad, was run over and instantly killed by a train at Philadelphia, Pa., November 1.

Patrick O'Donnell, brakeman Louisville and Nashville, had his right hand crushed while coupling cars at Mobile, Ala., October 31.

William G. Wadding, brakeman New York, Lake Erie and Western, fell from his train near Otisville, N. Y., October 26, and was killed.

William Wilson, brakeman Louisville and Nashville, was run over and killed while coupling cars near Columbia, Tenn., November 2.

[Railway Age, November 15, 1889.]

Anderw Schwilick, baggage master Philadelphia and Reading, caught his foot in a frog at Pottsville, Pa., October 28, and his foot was cut off by a freight train.

Richard Hathaway, a brakeman, was run over and killed while coupling cars near Lyons, N. Y., November 6.

James Peterson, of the Milwaukee and Northern, at Iron River, Mich., was run over by a switch engine November 6, and received injuries from which he died the next day.

Charles W. Farnham, freight conductor Montana Central, fell from his train near Clancey, Mont., November 5, and was run over and so seriously injured that he died later in the day.

Thomas Kitchen, switchman on the New York Central, was run over and killed while switching cars at Suspension Bridge, N. Y., November 7.

[Railway Age, November 22, 1889.]

William Kelly, conductor Grand Trunk, was killed by a freight train at Trenton, Ontario, November 11.

Charles Bullock, brakeman Baltimore and Ohio, was run over by a freight train near Newark, Ohio, November 11, and had both legs cut off. He died after being removed to his home.

Martin Kelly, brakeman New York Central, had his hand crushed while coupling cars at Fairmount, N. Y., November 7.

Peter McShane, watchman Lehigh Valley, was run over and instantly killed by a train at Phillipsburg, N. J., November 12.

Wesley Osgood, a brakeman, fell from the top of a freight train near Tama, Iowa, November 16, and was run over and killed.

George Humphrey, brakeman New York, Susquehanna and Western, caught his foot in a frog while coupling cars at Paterson, N. J., November 16, and was run over and killed.

George Newsbaum, brakeman Chesapeake and Ohio, was run over and killed by a train at Huntington, W. Va., November 17.

Fred Stearn, brakeman Chicago, Milwaukee and St. Paul, fell from a work train at La Crosse, Wis., November 18, and was run over and killed.

Thomas Floyd, brakeman Chicago, Milwaukee and St. Paul, was crushed to death between the cars at Austin, Minn., November 15.

[Railway Age, November 29, 1889.]

M. Wallihan, brakeman Northern Pacific, was killed by the cars in Montana, November 19.

Charles Knox, brakeman Hannibal and St. Joseph, fell from a freight train near Chillicothe, Mo., November 18, and was killed.

Frank Redmond, a brakeman, was crushed to death by the cars in the Edgar Thomson Steel Works yards at Pittsburg, Pa., November 18.

George Pamphrey, brakeman New York, Susquehanna and Western, caught his foot in a frog while coupling cars at Paterson, N. J., November 16, and was run over and killed.

A conductor named Mulehand, on the Northern Pacific, was run over and fatally injured while coupling cars near Bozeman, Mont., November 16. His left arm and leg were badly crushed, but he died before they could be amputated.

William Nichols, brakeman New York and New Englanad, was seriously injured about his head, being caught between two cars at Providence, R. I., November 18.

McGlynn Tarbet, brakeman Pittsburg, Cincinnati and St. Louis, was slightly injured by being caught between the bumpers while coupling cars at Columbus, Ohio, November 21.

P. H. Newkirk, freight brakeman Pittsburg, Fort Wayne and Chicago, fell on the track while coupling cars at Londonville, Ohio, November 21, and was run over and had both legs cut off.

F. B. Morse, brakeman New York, Lake Erie and Western, fell from a train near Monroe, N. Y., and was instantly killed.

John Coleman, switchman New York, Lake Erie and Western, had one finger crushed while coupling cars at Port Jervis, N. Y., November 16.

Bert Gore, brakeman Ohio, Indiana and Western, fell from a freight train as it was crossing the bridge over the Wabash River at Covington, Ind., November 22, and was drowned.

C. A. Falley, freight conductor, Texas and Pacific, fell from his train near Marshall, Tex., November 21, and was run over and killed.

On the same day, near Emigsville, Pa., a freight brakeman named Johnson fell between the cars and was run over and killed.

J. A. Boley, a freight brakeman, was fatally injured while coupling cars at Huntington, W. Va., November 22, and died several hours later.

W. T. Read, a brakeman, fell from a freight train, Jefferson, Tex., November 22, and was run over and instantly killed.

Daniel Dugan, switchman, Wabash road, was run over and instantly killed while switching cars at Kansas City, Mo., November 23.

L. S. COFFIN.
Fort Dodge, Iowa.

Mr. COFFIN. I have given the dates, the railroads, and the names of the persons injured. And that does not embrace more than one-half. We do not get it all. Now, the bill that I have referred to—and I suppose it is understood that I drew it up——

The CHAIRMAN. If you will allow me, is not that bill the law in your State?

Mr. COFFIN. It was passed by our State substantially as this. I want to say in regard to my State—I am better known there than I am to you; my work is known—I want to say that in the senate of the State of Iowa not a single vote was given against this measure—not a single vote. Now I want to ask you to allow me to be apparently a little egotistical, because I must be in order to show you why I think I have some information that would be of value to you.

When I first went on the Iowa commission it was the rule of our commission to investigate any serious accidents on railroads and to

report to the governor. It had not been their custom to investigate when a railroad man was killed. They thought it was a necessity somehow, that it occurred as a matter of course, that some men had to be killed. But the reports of the killing of men came in so rapidly that I began to feel as though I must investigate it. I began to feel that I could not meet my obligations unless I did. So as soon as I heard that a man was killed I went right to the place and investigated it. I then began to go to the managers of the roads, and to talk with experts and see if there was not something that could be done.

The master car builders appointed a committee to take hold of a series of experiments to test the practicability of automatic couplers and power brakes; and unless you gentlemen are familiar and understand perfectly well what the Master Car Builders' Association is I will tell you.

As the railroads began to expand in this country and they began to have joint arrangements and the cars went from one road to other roads, it was found necessary, as the number of cars grew, to have arrangements by which the different roads would have repairs, you may say, so that a car that was broken down on a foreign road could be repaired and go on its journey. So they organized what is called the Master Mechanics' or the Master Car Builders' Association, which is an important service in railroad circles. They meet together every year in annual convention and discuss this matter of the interchange and repair of cars.

This association, which is some twenty-eight years old, has its annual convention, and represents in that association some 90 per cent of all the railroads of the country. They may be called, as Judge Cooley says, a confederation of car shops. They meet together to discuss this important point of having couplers, brakes, and other appliances of a standard character.

From 1880 to 1882, 1883, and 1884 this question of couplers agitated them, and it was a matter of a great deal of interest and discussion.

When the Miller platform, which is universally used on passenger trains, went into use then they commenced the discussion of a coupling for freight cars. That has been under discussion for a long while. In 1884, at their convention in Saratoga, by a large majority of votes, they decided that the true mechanical principle of a freight-car coupler was similar to the passenger-car coupler—a verticle hook coupler—as you have seen many a time on a passenger car. It could not be like that exactly because of the platform, which was not practicable in freight cars.

In 1884 they appointed a committee to meet and investigate this matter of couplers, and in the fall of 1885 an advertisement was sent out all over that any party who had a coupler which he wanted to bring before the notice of the railroads should fit up two cars with the coupler and have them present at Buffalo so that the experts could test them.

I was at that test, and a great many kinds of couplers came. They tested those couplers in every conceivable way that they could and would be in actual service.

The committee that had charge of that voted that twelve of those couplers were apparently practicable, and they were voted upon to be kept for future experiments and future service and consideration.

The committee again made a report after that meeting. Their next

report was made at Minneapolis in 1887. I was also there and heard that report.

That report decided that the Janney type of coupler, of this vertical plane type, was the practicable coupler. That was decided by a two-thirds vote of the association.

They adopted the report of that committee advising the adoption of the Janney type—not the Janney coupler, but the Janney type of coupler. Then—and this is one of the important things that I want you gentlemen to keep in mind—by a rule of that association, any important action of that body relative to adopting a standard has to be submitted to the companies they represent, and if after ninety days of consideration the management of the company sends back a letter ballot approving the action of the master car builders in adopting a certain standard, then that becomes a standard for all the railroads in this nation, or at least those represented in that association, which is nearly 90 per cent.

That action was taken, and in October the managers returned a letter ballot with over a two-thirds vote corroborating the action of their master car builders. The executive committee were authorized to select a coupler that suited them of this type, change it to suit, and draft the lines of it, make specifications, and then advertise to the world that any couplers of this type, vertical plane hook type, that would automatically couple with the one they selected, and could be coupled with a link-and-pin coupler, should be considered the standard and all the railroads could use it. There are to-day ten to fifteen of those types of couplers, which are now being used by the railroads.

Now right here let me say in passing in regard to your bill, Mr. Chairman, and the Massachusetts bill, which provides for a committee of experts to select a coupler, this work has already been done by far better men than you can possibly have it done by any committee that can be created, because these railroad experts have been trying for years; they were perfectly disinterested, had no interest whatever in any of these coupler companies, and by these years of tests and all like that they have decided which is the practicable one and now the companies are buying them and putting them on pretty largely.

You will see that the New York Central here the other day made a contract for two different couplers of the same type, six or eight thousand of each. One is called the Gould. I do not recollect the other. The C., B. and Q. made a contract for 14,000 of these couplers. Mr. Hughitt, of the Northwestern, told me that they would give a large order for them right away and put them on all their cars.

So that this work that you contemplate in your bill for the Commission to do has already been done, in my mind, much better than can be possibly done by any commission you may create.

Now in regard to the brakes. The same thing almost has been gone through with by these master car builders in regard to ascertaining the advisability or practicability of applying power brakes to freight cars. It is well known as a matter of history that the test at Burlington in 1886 and 1887 was the most remarkable event in railroad history ever had in this nation. There for weeks the experts were there; and let me give you the particulars. Every man who had a brake which he wanted to sell to railroad companies was requested to come to Burlington with fifty cars equipped with his brake.

Senator REAGAN. Before you pass away, is this coupler which was agreed upon by the Master Car Builders' Association a patented article?

Mr. COFFIN. Yes, sir. And I want to say that Mr. Janney released by writing to the master car builders a certain patent which he had on these lines. He released it to them, and now it becomes public property, that part of it. There are other little combinations in other couplers which are patented.

Senator HARRIS. Do I understand you to mean that the coupler agreed upon by the master car builders is now free from royalty; free from patent altogether?

Mr. COFFIN. Not altogether. The locking device has a patent upon it. It is quite an old coupler; it has been in use.

Senator HARRIS. Is that Janney's patent?

Mr. COFFIN. Yes, sir; but he released those particular lines which the master car builders wanted, so that there would be competition among other builders for the same type.

The CHAIRMAN. Have you any idea what it is costing the railroads to purchase these couplers?

Mr. COFFIN. It costs from $12 to $25 a car, depending on which patent they buy. Some are cheaper than the others, but the highest is $25.

Senator BLAIR. None of these couplers have patents, have they?

Mr. COFFIN. Oh, yes, sir.

Senator PLATT. What do you mean by $25; for the right of using?

Senator WILSON. Including the right.

Senator PLATT. Equipping the car?

Mr. COFFIN. Yes, sir.

Senator BLAIR. Both ends?

Mr. COFFIN. Yes, sir.

At the hearing before the House committee the committee asked me if I could not furnish them a model so that they could see what these couplers were. I told them that there were couplers at the Interstate Commerce Commission. I have now two models here which I can explain to you.

The CHAIRMAN. I think it better that you conclude your statement first.

Mr. COFFIN. All right.

Senator BLAIR. All the couplers have a patent upon them?

Mr. COFFIN. Yes, sir; all do.

I was on the point of the brake business. The conditions of the test were that each man should come there with fifty cars equipped with his brake and put them in the hands of the experts, and they would put them through all the motions required in actual service.

Senator BLAIR. You are speaking of brakes now?

Mr COFFIN. Yes, sir. There were some six different kinds of brakes brought there. I do not want to detain you in recounting the terrible work that we had there in those experiments, in making what is called emergency stops, and all like that. They wanted a brake that the engineer could apply instantly when danger showed itself and still apply it so as not to wreck the cars of his train by the terrible shocks that are occasioned by the stopping of the train suddenly.

The first year it was almost a failure of all the brakes.

The CHAIRMAN. You speak of a terrible time you had; was anybody killed in the contest?

Mr. COFFIN. It is almost a miracle that we were not.

Senator BARBOUR. I suppose it was terrible on the cars.

Mr. COFFIN. Yes, sir. Strongly built cars were mashed into kindling wood there by the score, and the car that I rode in all the time there, every little while they would make such a stop that the center pin that held the cars to the trucks would be shaved off like a tallow candle. The only way we could do was to have a common box car, and spread cushions on the floor. And even then we would be piled up in one end of the car nearly every time they made a stop.

The CHAIRMAN. What business had you there?

Mr. COFFIN. I was commissioner from Iowa, and I saw these men being killed, and I wanted to know if there was not a remedy. I felt that I must do it. They invited the commissioners of the different States to be there. Several came, but one ride down that course satisfied them, and they left, every one of them. [Laughter.] The railroad boys will corroborate me so far as that is concerned.

Senator WILSON. The Iowa commissioner remained at his work?

Mr. COFFIN. I felt as though I must.

Senator BLAIR. Oh, he was born in New Hampshire.

Mr. COFFIN. None of the brakes in emergency stops was found to be suitable and practicable to freight service to make it safe. The test was over, and it was advertised to the world that they would repeat it the next year, in 1887.

I went there again on invitation of the expert to the 1887 test. Only three brakes came that time.

What we call the buffer brakes were entirely knocked out the first year. Those were the ones that gave us the most danger. The next year there were all air brakes. The only brake which came that year which was at all practicable was a brake that came from Germany. It was a Westinghouse brake to all intents and purposes, but its valves operated by electricity with a little dynamo on the engine, which enabled the engineer to apply the brake to the last car of a train of fifty cars just as quickly as to the first car. That prevented the terrible shock. You will understand that in the first place applying a brake to a long train the brake set on the first car going, say, 40 miles an hour (the ordinary slack of couplers in a train of fifty cars is nearly 18 feet in all), it leaves the last car to come up 18 feet at the rate of 40 miles an hour after the brake has been applied to the first car. The German brake applied it to the last car just as soon as to the first, and the stops were made just as smoothly as in a palace car. They hurled that train down that grade of 53 feet per mile, at the rate of 40 miles an hour, and when the signal was given they stopped the train inside of 500 feet without a particle of damage or anything of the kind.

The CHAIRMAN. I thought you said the Westinghouse brake and the German brake were the same.

Mr. COFFIN. The air part was the same. Mr. Carpenter invented a plan so as to apply electricity, so that the valves were operated by electricity.

Senator BARBOUR. It is patented in this country.

Mr. COFFIN. It is not in use here.

We went away from there feeling greatly discouraged that we

could not get men off the top of the cars very soon, because managers of roads would be very slow to adopt a brake that had all the complications of electricity to it, necessitating having electricians with every train.

I quote from the report of that committee to the organization of the master mechanics, which will be interesting to you:

In our report to the convention last year the main conclusion that we arrived at was that the best type of brake for freight service was one operated by air in which the valves were actuated by electricity. Since that time your committee has not made any further trial of brakes, but the aspect of the question has been much changed by the remarkable results achieved in nonofficial trials which have taken place in various parts of the country, and have been witnessed by many members of this association. These trials show that there is now a brake in the market which can be relied on as efficient in any condition of freight service.

The present position of the freight train brake is, briefly, as follows:

First. Brakes can be, practically speaking, simultaneously applied without electricity throughout a train of fifty freight cars.

Second. Other inventors are working at the problem of making an air brake which will be rapid in action and suitable for service on freight trains. We also understand that inventors are working at buffer and electric-friction brakes, but we have no reason to hope that brakes on these principles can successfully compete with air brakes. In view of these conditions your committee does not recommend the adoption of any particular brake, but considers that a freight-train brake should fulfill the following conditions:

First. It shall work with air of 70 pounds pressure. A reduction of 8 pounds shall set the brakes lightly, and a restoration of pressure shall release the brakes.

Second. It shall work without shock on a train of fifty cars.

Third. It shall stop a train of fifty empty freight cars when running at 20 miles per hour within 200 feet on a level.

Fourth. When tried on a train of fifty cars, it shall maintain an even speed of 15 miles per hour down a grade of 53 feet per mile without variation of more than 5 miles per hour above or below that speed at any time during the descent.

Fifth. The brake shall be capable of being applied, released, and graduated on the whole train by the engine, or without any assistance from the brakeman or conductor.

Sixth. The hose coupling shall couple with the present Westinghouse coupling.

We recommend that all freight cars fitted with such a brake shall be marked "air brakes" on each side of the car, near the top. The committee further recommends the use of iron or steel brake beams, and that the subject of the best form and proportion of brake gear and the selection of a standard solid brake shoe for use with metallic brake beams should be intrusted to a committee appointed for the purpose.

G. W. Rhodes.
Geo. Hackney.
John S. Lentz.
D. H. Neale.

The present position of the freight-train brake is briefly as follows: As brakes must be, practically speaking, simultaneously applied without electricity throughout a train of fifty cars, other inventors are at work on this problem to make air brakes.

This is about all that I want to say. I do not want to take up your time to say more in regard to it.

In the fall of 1887, after the tests at Burlington and after the report of the committee at their convention in Minneapolis, I received an invitation from the same experts to come to Burlington to witness another trial. It was not an unofficial trial. This was by the Westinghouse company. There were fifty of those cars, 60,000-pound capacity cars, equipped with the improved brake. The action of that

brake was the same as the action of the brake of Mr. Carpenter, which was operated by electricity, as far as its results were concerned.

I want to say here, if you will allow me to take the time, we went down that grade at the rate of 40 miles an hour on a train two-fifths of a mile long, and at a signal given that train would be stopped inside of one-quarter to one-third of its length without any shock at all. That train went all over this nation, to all the great railroad centers, and on advertised days hundreds and thousands of railroad officials went out to see it and ride on it, and they saw its operation.

Senator HARRIS. Was the brake applied by the engineer?

Mr. COFFIN. Yes, sir; and not a man was on the top of the cars.

Now there are other brakes. I do not want you gentlemen to understand or think that I have any partiality to the Westinghouse brake or any other brake. I have kept myself entirely aloof. I have no prejudice against any brake. There are other brakes that will do the same thing, probably. In the bill which I drew up and which Senator Allison introduced, I carefully avoided everything of that kind which looked toward favoring any particular brake.

The thing is solved; the question is solved; the problem is solved. You ask in your bill, Senator, for these experts to inquire into the subject of applying power brakes to freight trains. That has been decided and acknowledged so by the best railroad men in this nation, and to-day they are putting these brakes on rapidly.

I want to say that it does seem to me that the railroad men are the only men who can decide on the practicability of any of these appliances, and they will do it.

Now, you pass a general law asking or requiring that each company shall equip its cars with automatic couplers and with power brakes under the control of the engineer.

Their own self-interest will lead them to uniformity in this matter. The labor of the Master Car Builders' Association is directed to this end, to have uniformity. If the car that goes over the Boston and Albany road to Portland, Oreg., or California breaks down, we want to have supplies there so that it can be repaired and sent home.

Here was a very important point, too. We have passed this law in our State. Our roads, as you know, will have probably half of their cars all the time off in the country and on the New England roads. Our law compels our railroad companies to expend large sums of money to equip their cars. They lose the benefit of that expenditure of money unless we have a national law requiring that all roads which send their cars into our State for use in connection with our companies shall have the same kind of safety appliances.

You see that is a very important point.

The CHAIRMAN. You seem to be familiar with the history of the subject generally. Are there any other States that have adopted legislation on the subject?

Mr. COFFIN. I am very glad you asked me that.

When this question began to be agitated the States of Connecticut, Massachusetts, New York, and Michigan passed laws similar to the one you were seeking to have passed in your bill, having the commissioner select certain kinds of appliances. They did so and it has added confusion to confusion. It has added danger to danger. None of the States elected the same coupler, hence it makes it very difficult.

The former commissioner of Michigan approved of six different types of couplers, I think. To-day the commissioner has sent out an order withdrawing his approbation from all except the M. C. B. type—that is, the Master Car Builders' type. That is an argument I want to use here against having anybody outside of the railroad circles select any of these appliances. Just pass a general law and the railroads themselves will see to it that they get the practicable ones and the best ones.

Senator WILSON. Require the roads by law to adopt these safety appliances and then leave the particular kinds to be adopted to them.

Mr. COFFIN. Yes, sir.

The CHAIRMAN. In other words, do not specify anything about what kind of an automatic coupler they shall use.

Mr. COFFIN. That is all.

Senator BLAIR. Does the law of the State of Iowa requiring railroads to adopt these safety appliances provide penalties for failing to do so?

Mr. COFFIN. Yes, sir.

Senator BLAIR. Does it provide criminal punishment for failure to obey the law?

Mr. COFFIN. No. It imposes a fine of $500 and not over $1,000 and are liable for injuries to train men injured by cars in use contrary to the provisions of the laws. The Iowa law requires that all new cars and all repaired cars and all the cars that have to have new drawbars shall come into use again with automatic couplers.

The CHAIRMAN. Some of these bills, prominently the one from Massachusetts, introduced by Senator Hoar, provide that every time a freight car, or at least when an old freight car, goes into the shop for repairs it shall come out with these automatic couplers, etc. Now, the question which we did not understand exactly was whether an old car repaired, or a new car, with the automatic coupler, can be put into a train with a car which has not the automatic coupler, or whether you would have to make up a train with cars having the automatic coupler, or how that is. Please explain it.

Mr. COFFIN. Bear in mind what I have said in regard to the specifications made by the Master Car Builders, "any coupler that would automatically couple with M. C. B. couplers" (they call it that) "and could be coupled by hand to the old drawbar." That is one of the specifications. It must be capable of being coupled by hand to the old drawbar.

Senator BLAIR. The old method?

Mr. COFFIN. Yes, sir.

The CHAIRMAN. So that the automatic coupler could be coupled with an old car having the link-and-pin coupling.

Mr. COFFIN. Yes, sir. I have the models here. I was afraid to bring them up first, because you might think I had some interest in some coupler, which of course I have not. [Mr. Coffin here produced two models.] Here is one of the many kinds of couplers [indicating]. It is made to go together this way [exhibiting]. Now it is locked fast. No man has to go in there to lock it. Here is the place for the link [indicating], and here is the place for the pin [indicating], so that it can be fastened with a common link and drawbar.

Senator HARRIS. How do you unlock it?

Mr. COFFIN. Here [indicating] is a little chain that goes up to the car.

Senator HARRIS. You have a little chain with a crank out here [indicating] so that it can be uncoupled.

The CHAIRMAN. So that the men do not have to go between the cars?

Mr. COFFIN. They do not have to go between them.

The CHAIRMAN. The ordinary pin can go in there [indicating].

Mr. COFFIN. There is the place for the link [indicating].

Here is another one [exhibiting model], only it is a different make. I think there are some twelve of these.

Senator BARBOUR. That is very much like the Janney coupler.

Mr. COFFIN. Yes, sir. A novice could not tell the difference between them.

Here is the third deputy auditor [pointing to Mr. Shaw]. He was handling these couplers all the time. He was a brakeman and yardman at Indianapolis.

Senator HARRIS. Are these the kind that cost from $12 to $25 to equip a car?

Mr. COFFIN. Yes, sir.

Senator BLAIR. It only costs that to equip an old car that way?

Mr. COFFIN. That is all.

Senator BLAIR. How much does a car cost?

Mr. COFFIN. From three to five hundred dollars.

Senator BLAIR. Why should not the law require old cars to be equipped immediately with the automatic coupler?

Mr. COFFIN. This bill which I wish you to pass requires that all new cars and all old cars going in the shop for general repairs shall come into use again with these automatic couplers. Then after January 1, 1895, all cars entering into interstate commerce must be equipped with automatic couplers.

Senator BLAIR. Why wait five years?

Mr. COFFIN. Because it will be almost impossible probably to have these manufactured in time enough for the railroads to equip their cars. It will take a good deal of time.

Senator BLAIR. Do you know how many cars there are in this country?

Mr. COFFIN. A little more than a million of freight cars.

Senator BARBOUR. I do not see any necessity for legislation on this subject. The southern roads are putting these automatic couplers on their roads, and is it not better to let the thing to the railroads themselves?

The CHAIRMAN. It is a question whether they will be put on before half of the employees are killed off.

Senator BLAIR. And some roads will not put them on at all.

Mr. COFFIN. Here is a point which I wish to impress upon you very strongly. It is more dangerous to couple this coupler to a common old link-and-pin drawbar than to use the two links and pins. The boys are used to the old ones, and they are not used to these. I want this transition state to pass as rapidly as possible.

The CHAIRMAN. Do you think it a good thing to require all cars which have a little repairs upon them to come out of the shop with automatic couplers on them?

Mr. COFFIN. I should say "which go to the shop for general repairs."

Senator BLAIR. How long do these cars last?

Mr. COFFIN. The average life of a car is about six or seven years.

Senator BLAIR. Some less and some more?

Mr. COFFIN. Yes, sir.

Senator HARRIS. If that automatic coupler or an automatic coupler shall be adopted and the air brake, worked by the engineer, shall be adopted, will they not diminish the number of brakemen necessary to a train?

Mr. COFFIN. No, sir; not one particle. They have to have those men in order to attend to the switches and to make up the trains and to change at the station; they have to have them anyhow.

Senator HARRIS. It would not diminish the crew at all?

Mr. COFFIN. No, sir; it only takes them out of the dangerous position that they have to occupy now.

Senator HISCOCK. Have you any statistics to furnish to the committee of accidents to persons?

The CHAIRMAN. Mr. Coffin has already furnished them. I beg leave to say, also, that in the report of the Interstate Commerce Commission all the statistics which are necessary are given in order to convince anybody that it is necessary to adopt some safety appliances.

Senator BARBOUR. There will always be some accidents no matter what kind of brake you use.

Mr. COFFIN. More or less. Let me say a word further against your bill, Governor.

The CHAIRMAN. That is right.

Mr. COFFIN. All of you, I know, want just the same thing I do. Whichever will reach it the quickest will suit you best. As I had shown you before Mr. Hiscock came in, at the very least there are 7,000 of these boys injured or killed in handling these old couplers and the hand brakes every year. Now, at the very best, Mr. Chairman, you could not get your law into operation and decide which is the best coupler and get to work inside of a year; you can not in two years—you can not do it. Now, for the sake of having that commission, is it worth while to sacrifice 15,000 of these young men?

Senator HISCOCK. Let me point your mind to the discussion of this question whether in the past, and probably in the present, the liability of all carrying companies, and in fact of all people who are using machinery of any kind to furnish their employees with good, safe machinery for operation—in respect to passengers, of course, the rule is a little different—is not a sufficient incentive for railroad companies to adopt all these things in the ordinary course of their business? Now, connecting that with another principle that is involved, that if you set out and say what sort of machinery shall be used, that then you discharge the railroad corporation from any liability, if it does use it, for it is used in connection with the law, and then instead of the railroads acting under the necessity of doing this for self-preservation they back themselves up against the law and say, "We have complied with the law on this subject"—now the question is whether it is not dangerous, therefore, to enter upon this system of saying

what machinery shall be used and what new inventions shall be applied.

Mr. COFFIN. I thank you that you have made that argument. I want to use it.

Senator HISCOCK. You describe a certain kind of coupler?

Mr. COFFIN. No, sir.

Senator HISCOCK. Yes: it is an automatic coupler, adopted upon the theory that there can be no improvement made upon it.

Senator BLAIR. Automatic is a thing that works itself.

Senator HISCOCK. I understand that. You are proceeding upon the theory that there can be no improvement.

Mr. COFFIN. I think that is an impossible conception.

Senator HISCOCK. You are acting upon the theory that invention has reached its limit. Whenever you start out to define a particular contrivance or machine, or a plan that shall be used to do a specific work——

Mr. COFFIN. The bill does not specify any particular coupler.

Senator HISCOCK. Well, that is the point. I merely suggested to you.

Mr. COFFIN. The bill specifies that the railroad shall adopt some sort of automatic couplers that will not require the men to go in between the cars to couple. Now, you go on with the invention as much as you please. All we want to do is to keep the men out from between the cars. Make better ones if you can; these are self-acting. All we ask, no matter how great an invention you have, is that they shall couple themselves without danger to the men.

I hope the committee will give me a little more time. That is just what I arranged in the bill—that the responsibility shall be on the railroads. The moment that you define, as the Senator says, what they shall put on, then you relieve them of the responsibility, and they will adopt something so as to fill the letter of the law. The superintendent of one of the roads in Connecticut threw a coupler on a desk and said: "I am going to put that coupler on," and was swearing about it. "That will comply with the law. It will be broken all to pieces in ten days, I expect."

I do not want the responsibility to be upon this committee or upon Congress to decide what kind of a coupler or brake the railroads shall use. But I want to leave it to the railroads to say. They must adopt something.

Senator REAGAN. How would you get the concurrent action of the railroads?

Mr. COFFIN. Their own self-interest will do it.

Senator HISCOCK. Will not their own self-interest lead them to apply these appliances as quickly as they can?

Mr. COFFIN. No, sir. I drew the seventh section of this bill with an idea to that point—of having uniformity. I say that when any railroad company shall have equipped its cars, its rolling stock, with such appliances, it may refuse, prior to the date fixed in this bill, to receive a car coming from a connecting line that is not equipped with such appliances as to work with its own. That will lead to uniformity.

But the self-interest of the railroad. Before the gentleman came in, when I was dwelling on the action of the Master Car Builders, I said that what they wanted to get at was uniformity. They have

adopted this. They have had two conventions since, and not a man has ever moved to change at all, and, as I said before, the railroads are now putting them on by thousands. Now, the roads are putting on these couplers. I want this law passed so that the roads which have put them on shall have the benefit of their large expenditures.

Senator HARRIS. In regard to the air-brakes which you wish the railroads to be required to use, about what will it cost the railroads to equip a car with them?

Mr. COFFIN. Now, there is the Loughridge brake, made at Philadelphia; the Boyden, at Baltimore; the Westinghouse brakes, made at Pittsburg, and another brake or two made at other places. The prices range, I think, from $20 to $45.

The CHAIRMAN. For the brakes?

Mr. COFFIN. Yes, sir. I think the Westinghouse brake is $45. I think the Loughridge brake is $35, which is made in Philadelphia.

Senator REAGAN. Will these brakes always work?

Senator PLATT. Yes, that is the question: will they always work?

Mr. COFFIN. It is an impossibility for them not to work, except there is some mechanical matter which gets out of order.

Senator BLAIR. Will these different brakes which the Master Car Builders' Association agreed upon work together on the same train.

Mr. COFFIN. Yes, sir. That is one of the specifications of couplers, uniformity. The Westinghouse, the Loughridge, and the Boyden brakes interchange.

Senator PLATT. Is it not true that if you get a train equipped with these automatic brakes that sometimes they do not work, and then the train is worse off than if they were without them?

Mr. COFFIN. I do not think that it is so, because every car has a hand brake on it anyhow.

Senator PLATT. I asked the question because, on coming from California this fall, a train equipped with automatic brakes on the Union Pacific Railroad crashed into another train at the station and killed both engineers and three or four men, and the statement that was made at the time, when we got out to look at the wreck, was that the automatic brakes did not work.

Senator BARBOUR. There was an accident only recently in Staunton, and two or three people were killed, and they lost control of the train entirely.

Mr. COFFIN. Here is a gentleman [pointing to Mr. Shaw] who handled cars for twenty years.

Senator WILSON. The most careful man in the world may meet with an accident some time.

Mr. COFFIN. Just as sure as air will rush into a vacuum, just so sure will the brake work, unless there is some mechanical intervention which will prevent it.

Before I sit down, allow me to urge, for the sake of humanity, quick and early action in this matter. As I said before, at least twenty persons a day are being sacrificed by these two things in this nation. I do think, Mr. Chairman, that if this Congress were not in session and the President of the United States realized what this is, as I do, that he would be justified in calling an extra session to pass just such a law as this to stop this terrible loss of life and limb. Hence, I want to urge upon you to act at once upon this bill. I do hope it will be enacted into law inside of a week. I do not suppose I can reasonably

hope so, but I would like to have it passed inside of a week. You have passed a bill for the sufferers in the Mississippi Valley. Here are men killed. Here are mothers losing their only help, or young widows losing their husbands constantly, and I may say needlessly. There is no question about it. I know it. I have been through all these things on purpose to learn it, and the only remedy is quick action by Congress or by the States. That is the only remedy, and I do most earnestly urge that there will be quick action.

The CHAIRMAN. Your statement has been made very interesting to me, and I have no doubt to all of the committee.

Mr. COFFIN. This gentleman [Mr. Shaw] will probably corroborate everything I have said in regard to this matter.

STATEMENT OF MR. A. D SHAW.

The CHAIRMAN. Where do you reside?

Mr. SHAW. Indianapolis, Ind.; that is, I did reside there until about the 20th day of last November. After putting in about twenty-five years as a brakeman and yardman, I came on here to take a position in the Government service. I am ready to answer any questions that you gentlemen may see fit to put to me.

I might go on to state a great many things to corroborate what Mr. Coffin has said. I know the dangers of the drawbars which are in use at the present time, which are not self-couplers, and I know the dangers which a brakeman has to go through in going over a road in attempting to set brakes. I could just give a description of it in this manner. Say, for instance, it is a bad night—what we call a bad night on the road—sleeting, raining, snowing, etc. We hear the call for "down brakes." Of course we can not always be on top of the train. During cold weather we go into the caboose occasionally to warm ourselves. We are called out by a signal from the engineer—a whistle for "down brakes." We get out on top of the train. We find that the tops of the cars are completely covered with sleet. In attempting to get at those brakes a great many of the brakemen lose their lives, slip off the cars, and, again, even if they do reach the brakes, it is more often the case than it is not that they find that the brakes are frozen up, and they can not twist them. That again occasions danger. They can not set the brakes at all; can not set the dog; can not twist the brake. What we call the dog is the little piece of iron which catches on to the rachet-wheel. As no brakes are set, all will depend on the engineer to stop the train, and if the train was going with any speed it would take some time to stop it.

In making couplings in a yard or on the road a man can not do it with the common drawbar that is mostly in use at the present time without going in between the cars, and if he wants to in any ways put himself on the safe side, he has to put one foot inside the rail and the other outside. The consequence is that he runs more than one risk when he steps in between the cars. There is a brake beam, of course, on all cars. That comes even with a man's ankle. The least stumble he might make fixes him. This brake beam would catch him and throw him down. That is one of the dangers.

The other is when he has to make a coupling between drawbars, which are unsafe; what we call unsafe drawbars are on such cars as

Empire line and Union line, and great many other cars that are in use on roads in Indiana and Pennsylvania and the Eastern States. They have a large, flat, iron-face deadwood. They are about 1 foot in breadth and length. A deadwood, you understand, is something that protects the cars from coming together. The drawbars are between the deadwoods. Therefore, to get to the drawbar you have to place your hand either over the top of this deadwood or underneath or right in there quick and set your link in and pull your hand out. That is the other danger they have to pass through.

The railroad companies, a great many of them, have issued what is called the book of rules, and one of the rules they have asked the men to comply with is to use a stick always in making a coupling. I want to say just this in reference to that, that a railroad man wants the free use of himself. He has all he can do to take care of himself without carrying a club besides. You can go into any yard at the present time and you will not find ten in ten thousand using the stick. It is simply dangerous. The idea of a man using a stick to reach in 4 of 5 feet and try to hold a link weighing from 5 to 7 pounds, with a stick 2 or 3 feet long trying to make a coupling. They can not do it. When I say they can not do it, I mean they can not do it and make the coupling without more risk than without the stick. Sometimes the boys hide the sticks. Where the railroads insist on the enforcement of the rule the boys will hide the sticks under their coats. They run a greater risk in attempting to make a coupling with a stick than with their hands. I base my opinion on my practical experience.

The CHAIRMAN. They do not want to use the stick because they are more dangerous than coupling in the ordinary way?

Mr. SHAW. Yes, sir; that is it.

Senator BLAIR. Why is a rule like that insisted upon after experience demonstrates that it increases rather than lessens the danger?

Mr. SHAW. It seems as though they insist on the boys using them so as to protect the company against law suits.

Senator BLAIR. It looks to an outsider as though it were a means adopted to protect. But they know it increases the danger?

Mr. SHAW. Yes, sir; but, as I say, they do not insist upon it. For twenty-five years I was in the yard, and I never carried a stick, and they never insisted upon it.

Senator BLAIR. It would appear to a jury as though that was a careful thing to require?

Mr. SHAW. Yes, sir.

Senator BARBOUR. Were you ever hurt?

Mr. SHAW. I had this elbow injured; I had this finger [indicating] taken off, and I have been mashed between cars.

Senator BLAIR. I had a friend pressed up to within not more than two inches. He lived, but he was a great while getting well.

Senator BARBOUR. I think as a rule brakemen are very reckless of danger. They get careless.

Mr. SHAW. If they do not become reckless, if they are not swift switchers, the railroads do not need them.

Mr. COFFIN. That is the fact.

Senator BLAIR. I expect it is just like being in battle; if a man is not reckless he may as well get out of the business.

Mr. SHAW. I went in to make a shackle between two passenger cars at Richmond, Ind. Of course there was no such thing as an automatic coupler or an air-brake at that time. Apparently the drawbars were in good order. There was no deadwood to protect them. Passenger trains hardly ever use the deadwood. It seemed as though the followers were broken. The followers are steel or cast iron, as the case may be. A spring is put in between these followers to protect the drawbar from pushing back. If they give away there is no protection. In this case the draws were in apparently good order, standing out in their proper place. I thought there was nothing wrong. I supposed, and had a right to suppose, that they were all right. There were inspectors there to attend to that business. I was ordered in to make that shackle, and the consequence was the drawbars came together and shoved back and I was squeezed as flat as a pancake, almost.

Senator BLAIR. I do not see why the railroad managers are any more to blame than the public. You exact everything to be done for the least possible money.

Mr. SHAW. I got a letter from an old yardman that looks to me like it was written on the side of a box car. He was speaking about this same matter. He called my attention to it, and said if there was anything I could do as a railroad man to have this bill passed, to by all means have it done.

The CHAIRMAN. Do you represent some association?

Mr. SHAW. I came here voluntarily. When I heard that Mr. Coffin was in the city I went to see him, as I am very much interested in anything of the kind.

The CHAIRMAN. You have seen the bill Senator Allison introduced. What have you to say in reference to it?

Mr. SHAW. I think it is a good bill; I think it covers the ground.

The CHAIRMAN. What do you know about the adoption of the coupler by associations and railroads?

Mr. SHAW. I believe that I could state truthfully that they all favor it.

The CHAIRMAN. You think that if that bill were passed the railroads would adopt the coupler which the Master Car Builders' Association recommends as a uniform coupling; whatever coupling was adopted at all that all the railroads would come in and unite in favor of it?

Mr. SHAW. I think so. I do not see why they should object to it. It seems to me it would be to their interest.

The CHAIRMAN. According to Mr. Coffin's statement a railroad man in Connecticut said he was going to put a certain coupling on because the law required him to put it on, when he knew it would be mashed to pieces soon.

Mr. SHAW. I do not understand that the bill specifies any kind of a system of drawbars to be used, only that they be self-couplers.

Senator BARBOUR. I suppose the chief objection is the cost.

Mr. SHAW. I want to say this, that the cost of these drawbars would be less in time than any of those now in use, because they are cast iron and a little shock will break them. I refer to the class of drawbars not self-couplers. These large couplers—we call them the Janney couplers—there are a great many of them in use, on stock

trains especially. They are now putting them on stock cars; stock shippers desire it; also the automatic brake, a great many of them, too, are now in use. I see those that they are putting on are large, durable drawbars. They do not have to stand this shock, and the consequence is that they last a great while.

Senator BLAIR. I suppose a wrecked train would pay for putting on couplers on an entire road.

Mr. SHAW. Indeed it would.

ADDITIONAL STATEMENT OF L. S. COFFIN.

Mr. COFFIN. Let me say one word more.

The CHAIRMAN. Certainly.

Mr. COFFIN. In my experience with wrecks in my State I find that at least 50 per cent of all the wrecks of railroad freight trains could be prevented if the engineer could have put his hand on the brake instead of calling for brakes.

Let me call your attention to a wonderful statement made by Mr. Cooley, that only one brakeman in about five has a chance to die a natural death. Those are Mr. Cooley's own words.

Senator BLAIR. Only one in five?

Mr. COFFIN. Only one in 4.7 has a chance to die a natural death.

Senator REAGAN. You are safer in the Army.

Senator BLAIR. Certainly, and in time of war, too.

Mr. COFFIN. The superintendent of the Rock Island road said to me the other day: "I would rather my directors would give me 800 cars equipped with automatic couplers and brakes than a thousand cars worked in the old way. They would do more work."

I hope, gentlemen, that you will make an expeditious move in this matter. I am doing this for the boys' sake, and at my own expense.

STATEMENT OF D. P. M'KEEVER.

The CHAIRMAN. What is your name?

Mr. MCKEEVER. Daniel P. McKeever. I am train master of the Baltimore and Potomac.

The CHAIRMAN. If you have any ideas on the subject or information we would be glad to have it.

Mr. MCKEEVER. I do not know that I can say anything in regard to it, but if there are any questions I can answer I will be glad to do so.

The CHAIRMAN. Are you running trains equipped with automatic couplers or in the old-fashioned way?

Mr. MCKEEVER. The company has endeavored as far as possible to put modern appliances on all the cars it is building.

Senator BARBOUR. Freight cars?

Mr. MCKEEVER. Yes, sir.

Senator BARBOUR. Of course passenger cars all have them.

Mr. MCKEEVER. Yes, sir.

The CHAIRMAN. What is your judgment as to the importance of putting modern appliances, such as automatic couplers and air brakes, on freight cars?

Mr. MCKEEVER. So far as they have been used they work very sat-

isfactorily; but I do not know as the thing has been demonstrated as fully yet as it might be, for the reason that in many cases trains are very heavy and the air upon freight trains—I am speaking of the brakes now—does not work as successfully as it might.

The CHAIRMAN. What has been the trouble?

Mr. MCKEEVER. The trouble has been with the use of freight cars where the weight is more than in passenger cars, and they have not been able to keep the cars in the service up to the standard pasesnger cars for the reason that the freight cars have rougher usage.

Senator PLATT. So that there is danger that the appliances will not work?

Mr. MCKEEVER. Yes, sir; they will not work.

Senator BLAIR. They get out of order?

Mr. MCKEEVER. Yes, sir.

Senator BARBOUR. I suppose a freight car is made more cheaply, and is not as strong?

Mr. MCKEEVER. I do not know as the pattern of the freight car has anything to do with it. It is the equipment, or at least the air appliances, you know, which are not up to the standard. I do not think, myself, that the air is up to the standard that it will work upon a freight car.

Senator PLATT. If there is a defect anywhere in the appliances it prevents them from working fully?

Mr. MCKEEVER. That is it exactly.

Senator WILSON. Does the road with which you are connected operate any freight trains which are provided throughout with these appliances?

Mr. MCKEEVER. They do, sir.

Senator BARBOUR. The Pennsylvania has some?

Mr. MCKEEVER. Yes, sir.

The CHAIRMAN. What is your judgment as to the safety of the new and old appliances?

Mr. MCKEEVER. So far as I have found personally, I would sooner depend upon a brakeman than upon the air upon a freight train.

The CHAIRMAN. How about human life; which system is the safer to the men who have to run the train?

Mr. MCKEEVER. There is no question about the air brake being safer. But it is a question I want you to take into consideration, that a wreck might occur upon the air failing and where the brakemen are supposed to rely upon the air taking effect. They depend upon that, and of course accidents might happen that way. Now, they are always supposed to be in their places, at least they expect to be ready to apply the brakes when they are called upon. I would prefer to depend upon the hand brake to-day.

The CHAIRMAN. Do you think fewer men would be injured or killed by the old system than the new?

Mr. MCKEEVER. I do.

Senator HARRIS. I understand that you think the old system of applying brakes by hand is more efficient and reliable than the air brakes?

Mr. MCKEEVER. Yes, sir; upon freight trains.

Senator HARRIS. Now, to what extent or to what percentage is it more efficient?

Mr. MCKEEVER. That I am unable to state.

Senator HARRIS. Give us your approximate idea.

Mr. MCKEEVER. I could not give you that very clearly, because I have not looked into it. I do not think the air has gotten down to that point where it can be relied upon for a freight train. Where men are taught to rely upon the air brake possibly four or five days in a week and on the sixth day depend upon it to work and not be at their places, a wreck might occur wherein there might be more men injured than otherwise.

The CHAIRMAN. When you start out a freight train with the automatic couplers and air brakes, does the same number of men go along with that train as with a train equipped with the old system?

Mr. MCKEEVER. Yes, sir. We have never decreased the number of men.

Senator BLAIR. You have the same facilities of hand brakes on every train?

Mr. MCKEEVER. Yes, sir; we expect the men to rely upon the hand brake. We have never used the air brake entirely upon freight trains.

Senator WILSON. If anything should happen to an air brake on a freight train, then the engineer would give the signal for the men to resort to the hand brake?

Mr. MCKEEVER. Yes, sir.

Senator WILSON. Would it take them any longer on a train which is equipped with air brakes to get to the hand brakes than it does on a train which is not supplied with air brakes?

Mr. MCKEEVER. If they get to rely upon the air brakes the men will not be in their proper places.

Senator WILSON. That is a matter, then, between the employees and the company in respect to their obedience to regulations?

Mr. MCKEEVER. As to their duty.

Senator WILSON. So that the danger which might occur if they are not in their places results from a violation of the regulations of the company?

Mr. MCKEEVER. That would be about it.

Senator WILSON. Would it not be very easy to have those regulations enforced so that the brakemen would understand if they are not in their places at the time the signal is given for them to apply the hand brake that they would be discharged? Would not that have the desired effect?

Mr. MCKEEVER. There would have to be somebody gunning after them all the time.

Senator BLAIR. You have not mentioned the coupler.

The CHAIRMAN. You use the most modern appliances, or those, for instance, which have been adopted by the Master Car Builders' Association?

Mr. MCKEEVER. I can not answer that fully, for the reason that I do not follow that up.

Senator BARBOUR. Mr. McKeever is connected with the Pennsylvania system of railroads, and they are supposed to be up with the most advanced line——

Mr. MCKEEVER. The Pennsylvania Railroad as a rule adopt all, or at least try to adopt——

Senator BARBOUR. And they led off with the Miller platform and the automatic coupler?

Mr. McKeever. All that is looked after at Altoona.

The Chairman. You can use the automatic coupler, and that does not necessitate the using of air brakes, does it?

Mr. McKeever. Oh, no, sir.

The Chairman. They are separate institutions?

Mr. McKeever. Yes, sir; separate entirely.

Senator Harris. Wholly independent of each other?

Mr. McKeever. Yes, sir; independent of each other.

The Chairman. How about the coupler now?

Mr. McKeever. So far as the coupler is concerned, I have not given that any more than passing thought. The Janney coupler is one we have had in service for a long while. So far as I know of the use of them, between the Janney and the Miller—there is one other coupler which I forget—the Janney is far superior to the others. I can only say that.

Senator Harris. The three are automatic?

Mr. McKeever. Yes, sir; the Janney has given more satisfaction than the others.

Senator Blair. You are referring to passenger trains?

Mr. McKeever. Yes, sir; and freight trains too.

Senator Blair. Do you use the Miller coupler on freight trains?

Mr. McKeever. No, sir; I never saw a Miller coupler on a freight car.

Senator Harris. Do you use an automatic coupler on freight cars?

Mr. McKeever. Yes, sir. Upon a certain class of freight trains, a number of freight cars that we are using, and nearly all we are putting out, we are putting them on.

Senator Barbour. The southern roads, I believe, are putting them on?

Mr. McKeever. The Richmond and Danville are putting them on.

Senator Hiscock. Your system of roads is working into the use of them just as rapidly as practicable?

Mr. McKeever. Yes, sir.

Senator Wilson. How about the Star Line?

Mr. McKeever. They have the old couplers.

Senator Blair. How long have you been located at this station here?

Mr. McKeever. Possibly three or four years. I have been with the Pennsylvania Company for the last fifteen years.

ADDITIONAL STATEMENT OF MR. A. D. SHAW.

Mr. Shaw. Senator Wilson put the question which I was anxious to have answered. You did it just like a railroad man. I am talking of the Star Line and Empire Line cars. They are what we call among the railroad men "men-killers," and that road runs more of them than any other road in the country.

The Chairman. Which road?

Mr. Shaw. The Pennsylvania system.

ADDITIONAL STATEMENT OF MR. L. S. COFFIN.

Senator Platt. I would like to ask Mr. Coffin a few questions.

Mr. Coffin. I will be glad to answer you.

Senator PLATT. I believe Connecticut was the first State to adopt legislation on this subject, way back as far as 1882.

Mr. COFFIN. Yes, sir.

Senator PLATT. What has been the experience, do you know, under that legislation in the State of Connecticut?

Mr. COFFIN. The commissioner of that State at the conference of railway commissioners a year ago last March, held here in this city, spoke very unfavorably in regard to that; that it was not satisfactory, and he voted for a resolution, which was passed, requesting the Interstate Commerce Commission to take up this matter and have something done which would be uniform.

Senator PLATT. What was the trouble there? It is my State and I want to get a little more information.

Mr. COFFIN. The trouble was in selecting different types and not having one kind of coupler. That was the trouble.

Senator PLATT. Have they adopted the coupler of which you have been speaking there?

Mr. COFFIN. No, sir; I think they have chosen four. That is my impression, but I may be wrong. The Massachusetts law allows the commissioners to choose——

Senator PLATT. They ruled that the cars must be equipped with one of four kinds of couplers?

Mr. COFFIN. Yes, sir.

Senator BARBOUR. Do you know anything about the Canadian roads; how they are equipped?

Mr. COFFIN. No, sir; I do not.

I want to say that it takes only about 20 or 25 per cent of the cars in any freight train to be equipped with power brakes to control a train, and it can be controlled then better than any three brakemen can; where the engineer can control it without having the men on top the train.

The CHAIRMAN. What do you say about Mr. McKeever's statement that hand brakes are more reliable than the air brakes?

Mr. COFFIN. That is entirely owing to the negligence of the car inspector to see that everything is right. Is not that so, Mr. Shaw? It is all owing to the negligence of the car inspector. If he sees a drawbar wrong, he should report it; mark it. Much injury comes from that.

Senator BARBOUR. Sometimes those defects are concealed.

Mr. COFFIN. A good car inspector will find out the defects.

At 12 o'clock m. the committee adjourned.

WASHINGTON, D. C., *May 14, 1890.*

The committee met at 10 o'clock a. m.

The CHAIRMAN. We will hear Mr. Roberts, president of the Pennsylvania Railroad Company.

STATEMENT OF GEORGE B. ROBERTS.

Mr. ROBERTS. Mr. Chairman, my object in asking the privilege of appearing before this committee was not to interpose obstacles to properly securing the safety both of the employees and the traffic, but

to explain why we do not believe that this kind of legislation will accomplish what you hope to reach. On the contrary, in my judgment, such legislation as this would tend rather to retard the adoption of such devices as are from time to time discovered than to promote it. I suppose it will be admitted that we are all interested in endeavoring to do what we can for the benefit of our fellow-laborers, and we are all, at least the larger part of those who are engaged in railroad management, trying to adopt some method by which the dangers that come to those who are engaged in this class of business will be as far as possible removed. We know that those engaged in the system of railroad transportation have done and are doing a very large amount of work in this direction, and anything that seeks to interfere or cripple the natural growth of that effort, by endeavoring to hold it within the narrow channels of rigid legislation or shifting the responsibility therefor must, to a greater or less extent, interfere seriously with its progress.

In the case of the company which I represent, we have for many years, and to a greater extent now than ever before, kept up a perfect system of examination of all devices suggested for the safety of those who engage in our service as well as devices looking to economies in transportation. Both of these go in line. If you bend your entire energies to looking after the safety of the individual you cripple the economy of transportation to a certain extent, precisely the same as if in defending the country you look too closely to the safety of the soldier you imperil the safety of the country. That may seem a harsh way of looking at it, but nevertheless it is what the public demand.

If the Pennsylvania Railroad Company, which to-day owns a little over one-tenth of all the cars in the United States, were required to put every car in the condition that this class of legislation would demand it would, for the time in which they are engaged in doing so, absolutely stop improvements in any other line, because the amount of money that would be required would be fully equal to all that they can in any one year reasonably command. It would require an expenditure of from $70 to $100 for each car, and on 100,000 or 110,000 cars that means between $7,000,000 and $10,000,000.

The CHAIRMAN. Is that the number of cars you have?

Mr. ROBERTS. Yes, sir. We have about 110,000 cars on our entire system.

The CHAIRMAN. Have none of those cars these appliances now?

Mr. ROBERTS. Yes, sir; about 10 per cent. I am speaking now in round numbers.

Senator BLAIR. Does that include your passenger cars?

Mr. ROBERTS. No, sir. All the passenger cars are equipped with air-brakes and couplers.

Senator BLAIR. You refer only to freight cars?

Mr. ROBERTS. Yes, sir. That amount of money is rather more than we expend annually in improvements upon our entire system, and many of those expenditures are not for the purpose of procuring increased traffic, but for the purpose of adding to the safety of the general public. Of course, we can not stop the general system of improvements and put all the money into Janney couplers or any other class of couplers that may be found right and proper, or into air brakes.

Therefore we take the amount of money that we can properly appropriate and apply it in the best way for the purposes of economizing the methods of transportation and securing the safety of the employees and general public. That the want of a proper coupler causes a large loss of life and great injury to those engaged in the business goes without saying. No man can safely step between two cars, whether they are standing still or are moving, without running a risk, and if any appliances can be devised that will avoid that danger we ought to and will obtain them as rapidly as possible.

The CHAIRMAN. Are there no appliances which avoid danger?

Mr. ROBERTS. There are appliances developed from time to time that are tending in that direction, and they have been adopted. As stated, we have adopted them on our cars to the extent of about 10 per cent, principally in the past few years. But Yankee ingenuity brings forward so many of these things that it is dangerous, if you want to do what is right and proper and get the best thing, to hastily adopt any device that may be suggested, no matter how good it may seem for the moment of time. It will not do to take $7,000,000 and change the entire equipment of the Pennsylvania Railway, and before you get through find that your $7,000,000 has been unwisely expended. You might say that it is foolish to wait until you find something better, and not go forward, and I agree with you in that to a proper extent. But if left alone to their own investigation of the subject there is enough incentive to be found in the personal interests of the corporation, as well as in the humanitarian side of the subject, to prompt at least the larger corporations in this country to adopt the new devices that are discovered and promote the investigations that will accomplish the desired result.

Senator BLAIR. If there were a general and universal law applying to all corporations, imposing as a primary necessity a provision for the safety of life in the progress of business, so that no one corporation would feel the pressure of that necessity more than another, to provide for safety in transportation to those engaged in it, would not that relieve you of this pressure that you speak of, so that you could impose upon the country at large an increase cost of transportation if necessary, and, regard being given to life first and to business profits afterwards, no corporation would suffer in consequence thereof? I am speaking now of an imposition of some general rule with reference to safety in the appliances that all corporations should make use of in their freight transportation.

Mr. ROBERTS. I think that all corporations will be bound to follow in this general line as rapidly as the circumstances surrounding those corporations make it practicable to do so.

Senator BLAIR. Consider this point in your reply: If you add to those circumstances one that does not now exist, the pressure of the law of the land, which shall be felt by all corporations alike.

Mr. ROBERTS. Certainly: if you do not carry the legislation too far, and make it require the improvement to be accomplished too rapidly within circumscribed limits. That is the difficulty. We are all human in this world, and unfortunately we are all looking largely after the dollar. There are many railroads in this country that simply could not do this.

Now, what would be the result to a certain extent? We are here seeking legislation that shall be for the benefit of the general public,

not for the benefit of a particular class. If you were to say to us to-morrow, you must have every car engaged in interstate commerce equipped in this manner or you will be subjected to rigid penalties, we would simply have to say to our shippers, "We have just so many cars that we can devote to interstate business; you can not load anything in this car to go beyond the State; it is against the law;" and we would confine our shippers for the time, shorter or longer, to the use of only such cars of that character as we have.

Now, you may say that that would hasten our getting the other cars. Certainly it would, but the natural effort of the larger companies to get there will bring that result about as quickly and with greater safety and certainty than by legislation. You go to a small corporation in the West and impose upon it this sort of a measure. They have but one or two thousand cars. Their bridges are in a tottering condition. They are bound to protect their bridges and rebuild them. They can not put on these couplers and air brakes, for they have not the money, and their business must be confined to State business. When they come to the State line and are delivering over to us, we say, "No; we can not have that car; it is not the right kind of a car." Therefore you seriously interfere with the local traffic of the country.

I do not know whether you gather from my remarks what I wish to indicate to you, and that is that, speaking for our own system of lines, we are strictly in harmony with everything that will tend to improve the transportation interests of the country in the line of taking care of the employees.

The CHAIRMAN. You have an organization, have you not, looking to that subject alone?

Mr. ROBERTS. Yes, sir. We have a corps of officers who are always engaged in the investigation of approved appliance for the cars. It is a department of our company.

Senator HARRIS. Let me ask you if there is not a car builders' association that is national, in which all the companies are interested?

Mr. ROBERTS. Yes, sir; there is a master car builders' association, which is composed of the master car builders of the various railroad companies of the country, and they meet and take up all devices and systems that are suggested for the improvement and betterment of the cars, their adoption of uniform standards, and their conclusions are received by the railroad companies as the result of much of the best intelligence that can be obtained on such subjects.

Senator HARRIS. Would it be hurtful to a railroad corporation if they were by law required to adopt such improvements and such devices as that association of master car builders should from time to time recommend?

Mr. ROBERTS. Simply in the line that I have been endeavoring to point out, and that is, if the Master Car Builders' Association were to determine, as they probably would, that for the present moment the best system that they know of is an automatic coupler of this or that device. Now, if Congress says that every railroad company shall accept that as conclusive, and compel them within one or two years to change all their cars to conform to that design, subject to the penalty of not permitting their cars to run in that class of traffic, many railroad companies could not afford to do it.

The CHAIRMAN. Suppose Congress should determine that that

must be done within some reasonable time; what time do you think that should be?

Mr. ROBERTS. It is very difficult indeed for me to determine what time that should be. As I said before, I think that that could be better and sooner reached by Congress not determining that interstate cars should be at any time equipped with a specific improvement. But Congress probably might go so far as to appoint a commission to see that the locomotives and car equipment of the various transportation companies of the country engaged in interstate commerce are in suitable condition and in accordance with their own proper standards. If the Federal Government get into this class of legislation why stop simply in determining that a car should have a coupler of this special character. Why not also that it shall have a steel axle, which shall be subjected to such and such tests? It is only within a very few years that the loss of life from the breaking of axles was very great. Or why not say that the locomotive boilers should be made of such and such thicknesses of steel, or all locomotive boilers shall be built of steel and not of iron. If you legislate on these details of construction, then the railroad companies are naturally relieved from responsibility in that direction, and their experiments come to an end.

At Altoona our company is continually conducting experiments in reference to the character and composition of the metal used in boilers, of the metal used in car axles, and of that used in rails. If you are going to subject the railroad companies to this class of supervision, then you might as well go into that and into the character of bridges, which is as serious a question as we have to deal with, and say that the bridges must conform to such and such standards. Therefore it is my idea that the details should be left largely to the railroad companies, and that the legislation should be more in the line of a general supervision. Probably it is necessary and right that the Government should take a general supervision, and you will do me the justice to say that I have never been opposed to Congressional legislation in reference to the transportation interests of the country. I only think that Congress made a great error when it did not take it up twenty-five or thirty years ago. It let the thing grow without any proper system of laws to govern and to regulate the individual or the corporation until the matter got into such a condition that it was hard to regulate it. And they injected into it an act which it is remarkable to me has not done greater harm. It was a wise effort, and I would not like to see it repealed, but I would be very careful in amending it. I would take any reasonable length of time that is necessary to thoroughly investigate anything that tends to interfere with individual or corporate efforts looking to the care of the employees and the economy of transportation. Certainly no country in the world owes more of its success to the efforts of those who have been intrusted with management of transportation than our own country. Its whole prosperity depends upon its transportation economies, because it is a country of great distances; and anything that unwisely hinders transportation must largely interfere with the movement of the products of the West to the seaboard.

Senator REAGAN. You mentioned that there was a department in your service giving special attention to the safety of life and property by new appliances. Please state to the committee what the character of the efforts made by your company is in that direction.

Mr. ROBERTS. Our work covers a wide field. Take, for instance, the lighting of the car. We have been five or six years at that. At one time gas was thought to be the safest and best light for a car. We had a most appalling accident occurring from gas. What was left of the train that did not get under water was burned by the gas above it.

We have now perfected what we think is probably the best system of lighting. If the Government had stepped in when that accident occurred from the use of gas and had said, "No more gas; the best thing to be used is oil," that would have stopped any further investigation of the question of lighting cars.

Next, as to the system of heating cars. The public have the idea that a car heated by a stove is a dangerous thing, and therefore the direction of legislating is against their use and in favor of steam.

If we were satisfied that it was the best thing to heat a car by steam, and if it were reasonably practicable to do so, we would do it. We have expended many thousands of dollars in experimenting in that direction. Mr. Ely, who is here, has charge of that matter. He has equipped a whole train and worked at it for years. When we gave an order that one or two hundred passenger cars should be equipped in that manner there was much discussion as to the wisdom of such a course, not as to the cost, but as to the wisdom of it, and whether or not the apparatus that we were going to inject into our system was not a great mistake. We had before us the fact that in a railroad disaster there were several persons found sitting bolt upright, dead from inhaling steam.

Steam that is injected into a car to heat it, or that will be used if you undertake to say that cars must be heated by steam, will, when inhaled, be at a temperature that will certainly cause death. Not that cars can not be heated with steam, the inhaling of which will not cause death, but a rigid law compelling railroad companies to heat their cars with steam will almost insure the fact that a large number of them will be heated with an apparatus far more dangerous than the ordinary stove.

The CHAIRMAN. What do you do now with the one hundred cars you referred to?

Mr. ROBERTS. We are heating now over 100 cars with steam apparatus. But the difficulty of applying that, of getting the proper character of steam so as not to interfere with the economy of the train and to insure to the individual greater safety than he has in the ordinary stove, is a very serious subject.

Senator REAGAN. What experiments has your company made in the way of couplers and head blocks on freight cars outside of the common link-and-bolt couplers?

Mr. ROBERTS. If you will permit me to let these matters be answered by Mr. Ely, who will follow me, I shall be obliged. He is the superintendent of the motive power of our road, and can answer them better than I can.

Now, the only object I had in appearing before you was to endeavor to indicate to you the difficulties that must arise from legislation which seeks to hold railroad companies in narrow lines and take away the competition that now exists between them in availing themselves of the ingenuity and invention that is devoted to effecting economies

in transportation. It is a very dangerous thing, and ought to be approached with a great deal of hesitation.

I appear here not as an advocate of the Pennsylvania Railroad, because probably these measures would do us as little harm as any other corporation in the country. We will get there just about as soon without this bill as with it; probably sooner and better. When I look at the grand system of railways in this country and know the numerous corporations who are not able to respond to this character of legislation, and the communities depending upon the ability of those corporations to serve them properly, I know that they must be permitted to a certain extent to determine exactly what is the best thing and to put the dollars that they have into that thing, and that in such matters we must make haste slowly.

The CHAIRMAN. Have you any knowledge of the general progress that is being made in this direction?

Mr. ROBERTS. I can say that there is great progress being made; that in the adoption both of the coupler and the air brake we are way ahead of England with all its legislation; it has hundreds of laws to govern its railways and bring them into rigid lines. None of you would compare the comfort of riding in a first-rate car in this country, both as to speed and comfort, with a car in England. Their progress in the way of transportation is much behind this country, and if they get at greater safety in taking care of the public it will be from the fact that they have a greater amount of money to appropriate for that purpose. If, when our railroads were first built, you had required them to be built of the character that you find, you would not have had any railroads in many parts of the country simply because capital would not have embarked in such a costly enterprise at that time. Therefore we must take the country as we find it, and believe that as the railroad corporations become stronger they will get better appliances for the safety of their employees and the public just as to-day they have better and safer cars and locomotives, better railroads, better rails, better cross-ties than any country that has ever attempted to prescribe the adoption by railroad companies of any particular character of car, locomotive, rail, or other device.

STATEMENT OF THEODORE N. ELY.

Mr. ELY. Mr. Roberts has so fully explained to you the general situation relating to the various bills under consideration that I fear I shall not be able to add much of interest. I can, however, indorse, without reservation, what he has said in regard to the inadvisability of any Federal legislation whatever as applied to the regulation of safety appliances for railroads.

I can not find words more fitting to express our objections to such legislation than are contained in the proceedings of the Board of Trade of England, quoted at considerable length in the report of the Interstate Commission, and more especially referred to in the very able letter written to the Commission by Mr. M. N. Forney. There will also be found in the appendix to the report of the Interstate Commission a letter which I wrote in response to their circulars propounding certain questions. That letter explains very fully my own views upon the subjects treated, and I need not repeat them here.

It may be of interest to you to know what organization the Pennsylvania Railroad has for work of this character. There is established at Altoona a corps of experts, of which I have the pleasure of being the head, whose sole duty it is to investigate all questions concerning the physical operations of the road.

This corps consists of a mechanical engineer of high standing, several assistants, and a large force of designers. To this division of the department are referred all mechanical questions, such as couplers, air brakes, etc. It has a well-equipped laboratory for making physical tests and ascertaining the strength and other properties of materials.

The assistants of the mechanical engineer first receive a technical education at the scientific colleges, after which they are thoroughly trained in the workshops and upon the road: after this they are selected according to their ability for positions with the test department.

The department of chemistry is in charge of a chemist well known in this and other countries for his professional ability. The work of this department is of such a magnitude that three or four chemists and other assistants are constantly employed.

In this laboratory are investigated a long list of items which may be said to bear directly upon the safety of employees and the public, such as the examination of burning oils and gases used in the lighting of cars, the examination of high explosives and inflammable substances offered for transportation. Since the establishment of these bureaus, some fifteen years ago, many printed specifications have been issued which have become to a great extent the recognized standards of this country, and many have been sent abroad for the guidance of railroad people in other countries.

Tests have also been made for the United States Government, some of which, as relating to oil for use in light-houses, have been of great value. You will therefore undoubtedly appreciate that such matters as are referred to in the bills under discussion have received very careful and uninterrupted attention in the most intelligent and painstaking way, and the large expenditure due to the maintenance of this bureau is practical evidence that the Pennsylvania Railroad considers these matters of great importance. It would take me a long time to enumerate the quiet work which has been done to make the handling of freight and passenger trains safer and more economical.

I especially refer to work which is not prominent to the public. The improvements that have been made in the strengthening of the timbers and the framework of cars, the widening of platforms and running boards, and the strengthening of wheels and axles have greatly decreased the number of fatalities due to broken-down cars or injuries from unusual shocks.

A single instance may be mentioned: The car axle most generally used several years ago was made from scrap iron, and the number which were broken in service led to a careful investigation, which resulted in a specification that all axles should be made from new iron and should be subjected to certain tests. The price of the new axle was over 50 per cent more than those formerly used, and notwithstanding the large expenditure involved the Pennsylvania Railroad adopted the new standard at once and proceeded to remove from service as rapidly as possible axles which had before that time been re-

garded as suitable for railroad work, and which were in general use throughout the country. The class of accidents most dreaded, especially on double-track road, are those due to the breaking down of freight trains about the time a passenger train is due. When the question is under consideration as to the desirability of having a board of Government experts, the existence of railroad bureaus of this kind should be carefully considered. I believe that no board could be formed that would be as efficient as this railroad bureau. It requires every-day contact and a living connection with the subject to secure the best results and most intelligent judgment. For this reason a Government board would not do good work or make rapid progress.

The CHAIRMAN. Such improvements you are constantly making?

Mr. ELY. Yes, sir.

Senator HARRIS. Can you tell the committee to what extent other railroad companies are engaged in the same character of work as you have described as applicable to your own company?

Mr. ELY. I can only say this: The Pennsylvania Railroad was the first to establish a bureau of this kind. We felt the need of it from all standpoints, from the standpoint of safety as well as from that of economy. The bureau was established about 1874—sixteen years ago.

Senator HISCOCK. Suppose you confine yourself to the question Senator Harris asked you.

Mr. ELY. Yes, sir. There did not seem to be any similar movement by other railroads of the country for a number of years after 1874, but within the last seven or eight years there have been a number of bureaus of a similar character established throughout the country, I can not say where or how many, but I know in New England there have been two or three. The Chicago, Burlington and Quincy road has quite a prominent one, and the Milwaukee and St. Paul has a department of this kind. In many instances the men who organized them have been drawn from the Pennsylvania Railroad's department. We have been constantly asked to recommend men for such work. The movement within the last three or four years has grown very rapidly, to such an extent that there has lately been organized an association of railroad chemists doing nothing but railroad work.

Sixteen years ago I do not think there was such a thing as a railroad chemist in existence, and the same is true with regard to other matters of railroad management. I think that answers the question of Senator Harris.

Senator HARRIS. Of course it leads in that direction. My object was to ascertain to what extent railroad corporations were bending their energies in regard to the adoption of such improvements as would give greater safety to the employees and to the general public.

Mr. ELY. The first thing to be done is, of course, to put intelligent men at the head of such affairs, and then for those men to act as rapidly as they can. A fool will often act more rapidly than an intelligent man, and the easiest way sometimes by which to get rid of a matter is to arbitrarily adopt it and then dismiss the subject. We commenced with the question of couplers some twenty years ago, and the coupler which is now spoken of most favorably—the Janney car coupler—was first used by the Pennsylvania Railroad on its passenger trains.

There were a great many defects in the Miller system, which was then pretty universally used on passenger cars, and we thought it was

not as good as the Janney; the Miller couplers certainly produced some degree of safety, but they also introduced dangers, I mean in some respects; they were not as safe as the pin and link for holding cars together. But in case of shock or collision they were safer. We applied these Janney couplers to about forty passenger cars in the centennial year; we thought them right, but waited the result of the trial before adopting them generally on the three thousand passenger cars that we were running. That went along and at the end of a year we found a great many defects in them, which could not have been known without a practical test; the result has been that what we started with originally as the Janney coupler is now very different mechanically, although in a patentable sense it is very much the same.

The CHAIRMAN. Is it made by the same patentee?

Mr. ELY. Yes, sir. In other words, the Pennsylvania Railroad developed it; many of the ideas that have made it successful were developed by the Pennsylvania Railroad in its own shops, by its own corps of experts, about whom I have spoken to you. The Pennsylvania Railroad has no interest in the patents in any way, but suggestions from mechanics here and there enabled the patentee to improve upon its original construction. He came to us with an idea and left with a useful thing.

The CHAIRMAN. And you have perfected his idea?

Mr. ELY. Yes, sir.

The CHAIRMAN. He has that yet to make money out of?

Mr. ELY. I hope so, as he had a hard and long struggle. However, we at once, as soon as we were reasonably sure that the coupler was safe—now mark you "safe," that was the only thing we asked for then—put it on all the Pennsylvania Railroad cars, and it has been in use for a number of years.

The CHAIRMAN. You mean passenger cars?

Mr. ELY. Yes, sir; on passenger cars. On freight cars of course it has only been very recently that this matter has been taken up vigorously. I suppose five years ago we commenced experiments with freight-car couplers. The natural thing for the Pennsylvania Railroad Company was to adopt the coupler it had already used for passenger cars. A close freight coupler was desirable in connection with the air brakes, but not necessarily an automatic coupler. We first tried the Janney coupler, as used on passenger cars, but found that it was not practicable. As constructed it was too weak in many respects to bear the severe shocks to which it was subjected. It has since been so strengthened that railroads have felt warranted in applying it to a large number of cars; that is, the Pennsylvania Railroad alone has this coupler on 10,000 out of 100,000 cars, and it is comparatively successful, although it is too early as yet to express a decided opinion as to its durability.

The CHAIRMAN. Can that arrangement be improved?

Mr. ELY. I think it will be found that it can be.

Senator HISCOCK. Suppose Congress should pass a law in the form that this bill proposes, with the definition that the coupler that is to be used under that law be literally complied with, and still the coupler need not be any improvement whatever upon the link and pin.

Mr. ELY. I should say the one that I have referred to might improve the pin and link.

Senator BLAIR. There are several bills which contain different provisions. To which do you refer?

Senator HISCOCK. The automatic coupler.

The CHAIRMAN. They all provide in a general way for an automatic coupler.

Senator HISCOCK. What I want to get at is this: Whether there are any plans that that statute literally requires to be complied with that would not be an improvement upon any other methods of coupling.

Mr. ELY. Yes, sir; I think you can make them decidedly more dangerous than they are and still comply with some of these bills. Automatic couplers could be and have been made which would be much more dangerous than the pin and link.

Senator HISCOCK. What I want to get at is this: If these were enacted into law whether, then, relying upon the law and keeping within the letter of it, it would necessarily, in regard to safety, be an improvement upon other methods?

Mr. ELY. You mean existing methods?

Senator HISCOCK. Yes, sir.

Mr. ELY. I think you might get on very dangerous ground and make it more dangerous than it is now. You must make the provisions absolute; you must have the coupler uniform, or practically uniform, so that any man on any road that has to handle them will at once be familiar with what he is handling and know it will perform certain functions, otherwise there will be hesitation and danger; he will go between the cars to examine them and to see what will make them couple, and grave dangers would be introduced in that way.

The Master Car-Builders' Association for a number of years was conducted upon a wrong principle—that is, a road having 500 had the same voice in the adoption of improvements as one having 100,000 cars. The Pennsylvania Railroad, therefore, refused to have anything to do with it, because it was practically an inoperative body, so far as standards were concerned. We then suggested that a reorganization be made on the basis that each company should have one vote for every thousand cars that it owned.

The CHAIRMAN. What organization is that?

Mr. ELY. The Master Car-Builders.

The CHAIRMAN. You are a member of it?

Mr. ELY. Our company is. We contribute very largely to its support, and if the railroads of the country would send their experts in the car-building line to the convention we would get views from all sections of the country, and be more apt to obtain the most intelligent and finally the best results.

The Master Car-Builders' Association, which represents probably two-thirds of the country—not all, some roads having nothing to do with it—after a number of years recommended a certain type of coupler, with which you are familiar. Now, that type, by some quite prominent roads, as you may know, is not considered the right type at all; they would consider it an injustice if made to use it by law.

The CHAIRMAN. Do you mean as a means of safety? Would they think it was a dangerous thing to use?

Mr. ELY. I do not know that they would object to that one point, but they say the form is necessarily a weak one and the breakages

would be very large, which would make the type impracticable. I mention this only to show that there is not an absolute unanimity of opinion even among some of the largest roads, and I therefore think that the time has not arrived for legislation of this kind, compelling the use of any couplers, because to be of the best use the bill must make the couplers uniform or else new dangers will be introduced.

Senator HARRIS. Let me ask you in that connection this question: If all the railroad corporations of this country were compelled by law to adopt, from time to time, such devices as this association of master car-builders should recommend to be adopted, of course within a reasonable time after the recommendation, would it not greatly add to the safety of human life and limb and the safety of the general traffic on railroads?

Mr. ELY. I think I might say yes and no both to that.

Senator HARRIS. I should like to know to which one of the answers you attach the more importance?

Mr. ELY. It is a question that can not be answered directly, for this reason: The Master Car-Builders' Association is a voluntary body of men, and their acts can not govern anyone who does not wish to join that association or have anything to do with them; this is evidenced from the very fact that the manager of one of the largest systems in the South said that he did not approve of the coupler which the Master Car-Builders had recommended—so that it would not be just or fair, and it would certainly interfere with the rights of the people, to pass a law requiring them to use what this Master Car-Builders' Association recommended.

They do recommend some things that are safe. I might say here that the original idea of the association was to promote a uniformity in the construction of cars that should be of a certain height; that the axle should be of a certain size, etc., so that every railroad would not have to keep on hand special materials to repair the cars of every other railroad in the country. Much that they have already done has promoted the safety of trainmen and others; but if asked to say whether everything they have to recommend to be adopted would be a means of producing greater safety I should say no.

The CHAIRMAN. Suppose Congress should enact a law with this provision:

That it shall be unlawful for any corporation, company, person, or persons operating any line of railroad, or for any car or transportation company using or leasing freight cars engaged in interstate commerce, to put into such use any new cars, or cars that have been sent to the shops for general repairs, or when either of whose drawbars need to be replaced by new ones, that are not equipped with safety automatic couplers or drawbars.

I will put it in a different way. Suppose that Congress were to enact that after 1895 no car should be used that did not have a safety automatic coupler. Now, could there be anything wrong in that? Does that declaration, the use of the term "safety automatic coupler," confine you to anything that you would not use if you were to undertake to make the best improvement upon your cars that you can, and would the time specified in there be too short?

Mr. ELY. I should say that that law would probably tend to kill a great many more men than are killed to-day, if worded in that way.

The CHAIRMAN. Why?

Mr. ELY. Because under the law a thousand different kind of couplers that would meet the requirements of that law could be used, and with that number of couplers there would be a great many more men killed than to-day, necessarily.

Senator HARRIS. Do you mean to say that there are a thousand different kinds of automatic couplers?

Mr. ELY. Yes, sir; over ten thousand different kinds. I think there are seven thousand in the Patent Office.

The CHAIRMAN. Does not that provision, though, leave the matter within the discretion of the railroad corporation, just where you want it, and that is to determine for yourself what you shall use, except that it is to be an automatic coupler?

Mr. ELY. No, sir; I think it is a little insidious; you say they must use that sort of thing. They could say, "If I must have that sort of thing I will use the cheapest I can get to meet the law."

The CHAIRMAN. Would you do that?

Mr. ELY. No, sir; we would not do it. We have applied the Janney coupler and Westinghouse air brake to about 10,000 cars; they certainly are not the cheapest appliances, but we thought them the best.

The CHAIRMAN. Do you say that any railroad company which pretends to be governed by any of the rules of humanity would pick out, if we were to legislate that they should put on an automatic coupler, and put on the meanest thing they could find?

Mr. ELY. I think some of them might put on the cheapest. I can refer you to a pamphlet of the New England Club in which is discussed a coupler that was used on our western lines several years ago; it is called the Safford automatic. Its use was discontinued a long time ago. I believe some modifications have been made since that time, but it is still practically a link and pin, which, although in a certain sense automatic, still has the objectionable slack.

Senator BLAIR. What reason do they give? Surely they do not urge its adoption because it is unsafe and weak.

Mr. ELY. I presume because it is cheap.

Senator BLAIR. Would they not, as a matter of safety and economy, recommend the adoption of any other coupler?

Mr. ELY. I can not say.

Senator BLAIR. The question that the chairman raised was, Are not the automatic couplers, or the better class of automatic couplers, better than the old system?

Mr. ELY. Not that one.

The CHAIRMAN. This bill we are referring to now, introduced by Senator Allison, does not undertake to determine the particular kind of automatic coupler at all, but it says an "automatic coupler." Now you say there are about ten thousand kinds of them.

Mr. ELY. Yes, sir.

The CHAIRMAN. It leaves to the railroads the discretion to determine which one they will adopt, and I should think if any legislation of that sort should be enacted at all it ought to be enacted that railroads should all be governed by the general judgment as to what would naturally be the best thing.

Mr. ELY. If you give them credit for their judgment to do that, you should also give them credit to do it without law.

The CHAIRMAN. Sometimes there is a sort of disposition to procrastinate among people, and not to spend money if they can get out

of it. I do not say that particularly of the railroads, but that is the natural way.

Mr. ELY. Yes, sir; that is true; but in such matters we must make haste slowly.

Senator BLAIR. I understand your judgment is that the automatic system of coupling is more dangerous than the antiautomatic system, if there is such a system?

Mr. ELY. Do not understand me that way at all. I say there are so-called automatic couplers to-day that would fill that bill which are more dangerous than the pin and link in general use.

The CHAIRMAN. At the same time there are automatic couplers that would make it safer to employees in the present situation?

Mr. ELY. Yes, sir.

Senator BLAIR. The best of the automatic system is better than the best of the other system?

Mr. ELY. Yes, sir.

Senator BLAIR. When used, it has proved itself better than the other systems?

Mr. ELY. That can not be said at this stage of our experience. We only know that the results thus far obtained are encouraging.

The CHAIRMAN. Let me ask you a question as to another bill, a bill introduced by Senator HOAR: "To secure the safety of freight cars employed in interstate commerce, by the proper use of proper couplers, freight-train brakes, and other appliances prescribed by the Interstate Commerce Commission." Suppose that such a law should be enacted, authorizing the Interstate Commerce Commission to prescribe the sort of couplers which should be adopted by all railroads on all cars within a certain time, say 1895, what would you say to that?

Mr. ELY. I would say just this: That if a law is passed requiring that a certain automatic coupler must be used it will have a bad effect. We should aim to get the best effects. I say there is no competent body, nor can you appoint any committee that can act with sufficient definiteness to warrant the passage of a bill that can say what will produce the best effects.

The CHAIRMAN. Suppose Congress should pass an act "That it shall be the duty of all common carriers by railroad that are subject to the provisions of the act to regulate commerce to supply and use automatic car couplers on all freight cars employed in the business regulated by said act," and that a commission of experts should be appointed to determine and report to the Interstate Commerce Commission their recommendation of the type of character of coupler found by them to be best adapted to use, and that within a given time the railroads should adopt the pattern so recommended by them, what would you say to that?

Mr. ELY. I have said no, to the first part: I have not considered the last part. I should think a board of experts would be an excellent thing to investigate and report upon these questions as information to the Government and to the railroads, but say emphatically that no laws should be passed compelling railroads to adopt appliances which they might recommend.

The Board of Trade in England has been in existence fifty years; they are an intelligent body of men, and we ought to study its history carefully as affecting the interests of railroads as well as the public.

In this sense a board of experts might be a very good thing, connected with some department of the Government, preferably the Interstate Commerce Commission; if composed of the right kind of men, it would give its reasons intelligently and without prejudice, and would say whether it would recommend legislation or not, by which we should be governed in the use of railroad appliances. To this board would also be referred, for investigation, bills which are presented as relating to this subject.

Senator REAGAN. Would it be safe, after providing for such a board of experts, to say that they should recommend some system which should be put in operation within any specified time, by gradually putting on the appliances, or an absolute time, when the safety brake should be put in operation?

Mr. ELY. There are so many conditions that surround that that I can not say positively, but I certainly would not recommend the enactment of laws enforcing their recommendations. I think if we start with these inspectors, and get reliable information before a committee of the Senate, that they can then study it in all its aspects, and especially as to whether it is financially possible for the railroads throughout the country to employ what these inspectors recommend, and that aside from the question whether the appliance is a good or a bad thing.

Senator REAGAN. We are informed that the Master Car Builders' Association has been making certain investigations on this subject, and making suggestions; but there is no power to secure the adoption of these suggestions even if it should be wise.

Mr. ELY. It has the power of a big ball; it is very difficult to start it, but when in motion it is not overcome by trifles or the prejudices of narrow men. The movement is now well inaugurated, and we find at this time something like one hundred thousand cars, probably one-tenth of the equipment of the United States, equipped with automatic couplers of the Master Car Builders' type.

The CHAIRMAN. Then there are about one million cars in existence?

Mr. ELY. Yes, sir.

Senator REAGAN. You think it is the best thing to leave these appliances to be worked out by the railroads themselves?

Mr. ELY. Yes, sir.

The CHAIRMAN. You spoke of this Government board of experts or inspectors. I suppose this is true that the large railroad companies—the Pennsylvania Railroad and also the Car Builders' Association, employ the highest type of mechanical skill and ability in their work?

Mr. ELY. Yes, sir; it is above the average.

The CHAIRMAN. They try to get some of the best people they can possibly get?

Mr. ELY. Yes, sir; they do get some of the best, but the average is better than the average of mechanics throughout the country.

The CHAIRMAN. I am not speaking of the general workmen. I am speaking of those upon whom they depend for the devices that they shall use and the plans of construction. And as to them, they employ the very highest talent obtainable?

Mr. ELY. Yes, sir.

The CHAIRMAN. If that be true and they are at work in that direction, how would you be benefited by a political board to be appointed?

Mr. ELY. Only as an intermediate body between the railroads and the Senate, we will say, or the Government. If the Government wants to know about these things, it would be very difficult for them to go to every railroad and get an opinion on this or that device. It would be impossible. If they have inspectors, men of intelligence and without prejudice, they could investigate and put it before them in precise form.

Senator BLAIR. You think it would be a protection to the railroads to withhold legislation?

Mr. ELY. It would; yes, sir.

The CHAIRMAN. What do you say to a provision of this kind: "That for the purpose of securing uniformity in the use of such car couplers and the most approved character of coupler, the President of the United States is authorized to appoint, by and with the advice and consent of the Senate, a board of five competent persons, three of whom shall have practical knowledge of the operation of railroads, and two of whom shall have mechanical knowledge of car construction, and none of whom shall be interested in any patent for safety appliances."

Mr. ELY. This is just in the direction that I indicated, and I think that is the best practice; the idea is right, but there should be no compelling law.

The CHAIRMAN. You are willing to have a commission appointed to investigate, but you do not want anything further done about it?

Mr. ELY. Yes, sir.

Senator HISCOCK. Do you think the effect of it would be that it would be found that it was better to have Congress let it alone?

Mr. ELY. I think the inspectors would advise Congress to leave it alone.

Senator BLAIR. You think it is best to leave it as it is, without any legislation?

Mr. ELY. Yes, sir.

The CHAIRMAN. Would not that be regarded by you gentlemen as a sort of protection, and would you not then do nothing in this matter?

Mr. ELY. Oh, no; do not underrate what has already been done without law; I think the moral influence of the inspectors would be splendid. I might read to you from the letter which I wrote to the Interstate Commission.

Senator BLAIR. What is that letter?

Mr. ELY. It was in regard to legislation.

The CHAIRMAN. I do not think it is necessary to have it read now.

Mr. ELY. I can speak without prejudice, for the reason that the lines with which I am connected have gone far enough in the matter of improved appliances to indicate what they think ought to be used.

The CHAIRMAN. This committee desires to ascertain if any legislation is available, and if so, what?

Mr. ELY. I have studied that matter for a number of years, because I have many friends abroad who have asked the same question you are now asking me, and think, generally speaking, that what has been done in England has been in the right direction; we could not follow that course exactly, but possibly with some modification it could be suited to our conditions.

However, as already said, I do not think compulsory legislation advisable. Further, from the best information obtainable, I feel confident in saying that I do not believe that the responsible manufacturers of automatic couplers and brakes would advise you to enact laws compelling the use of such devices, especially if any time is fixed. They might have thought differently at one time when very little was being done, but the conditions have so changed that I am sure that they would now advise against legislation.

The CHAIRMAN. You agree that there is a vast amount of injury and a large number of deaths resulting from this present mode of coupling cars, do you not?

Mr. ELY. I agree to that.

The CHAIRMAN. It has not been more than a month ago that four or five hundred persons were killed by the coupling.

Mr. ELY. The estimates which are printed are not far out of the way, though I believe they are above the average of the Pennsylvania Railroad. The human element is stronger in those who operate railroads than is found in the public generally; those who do not deal with railroad operations little appreciate the great strain railroad superintendents are under night and day, nor the sadness that follows a day of casualties. It has no parallel in any other profession.

Senator REAGAN. What is your judgment as to the effect of these improved couplers upon the property and interests of the railroad companies, outside of the question of humanity for the employees; would it promote or injure it?

Mr. ELY. I think a well-designed coupler might prove a source of economy in management aside from any question of safety; but that, of course, has yet to be established.

STATEMENT OF C. W. BUCHHOLTZ.

Mr. BUCHHOLTZ. Mr. Chairman, I can add very little to what Mr. Roberts has already said, except in so far as the New York, Lake Erie and Western Railroad Company, one of the three trunk lines, is concerned. They are doing everything they can in the direction which the legislation in these bills indicates. I have a few figures here which will show how much the Erie Company has done in this direction for the last three years.

The CHAIRMAN. Is that your road?

Mr. BUCHHOLTZ. Yes, sir; New York, Lake Erie and Western. It is called the Erie.

The CHAIRMAN. I did not know whether it applied to the whole country or to your road?

Mr. BUCHHOLTZ. Our road. The total number of cars under the control of the Erie is about forty thousand. Of that forty thousand in 1887, not one of them was equipped with any automatic couplers. To-day we have over three thousand, which is more than 15 per cent of the entire number of cars. I speak of freight cars. Of course the passenger cars are all equipped with them.

As far as the power brake on the locomotives is concerned, I may state that in 1888 of the total number of 756 locomotives 301 of them were equipped with the power brake. To-day out of a total number of 827, 513 of them are equipped with power brakes; in other words,

more that two-thirds of them, which seems to prove to me that if our railroad company is left alone it will get there as rapidly as any of these bills propose they should.

Mr. Ely has stated that all the railroad appliances in this country, as well as the railroad construction, are far ahead of those in Europe. Being somewhat familiar with those in Europe, and especially with those in Germany, I can say that they are absolutely under the control of the Government, and for that reason, unfortunately, I think, the progress in railroad appliances there is less than in any other country that claims to be civilized. They are very much crippled by improvements adopted to-day which are not suitable to-morrow, and in changing from one to the other they have gone way behind what they would have done had they belonged to private corporations.

We have built and will build bridges with stone without any legislation. We have adopted the power brake universally without any legislation, and it seems to me that the interests of the railroads will be better subserved by letting them adopt their own improvements rather than by Congressional legislation.

The CHAIRMAN. You say, as a matter of fact, in Germany, where the Government owns and controls the railroads, the regulation of the appliances by the Government has retarded and prevented the adoption of the safest and most modern devices?

Mr. BUCHHOLTZ. Most inevitably, and for this reason: To some extent it kills private enterprises, and above all things the Government would not assume responsibility for the couplers. The couplers decided upon by the commission of experts appointed under your action would be forced upon the railroad companies to use in a certain period of time, and they might like to do so, but they would thereby be relieved of all responsibility for its success, and would simply adopt it without knowing anything about it. That is what they are doing in Germany. They have a number of experts doing nothing else except to provide improvements, and the people who are interested in railroads wait until such improvements are developed and then they adopt them.

Senator BLAIR. I should think you gentlemen who are at the head of transportation in this country would see to it that Congress did not act foolishly in that regard, but would require only the best kind of coupler or appliances which were made.

Mr. BUCHHOLTZ. That would be done by this commission that Mr. Ely speaks of. If you had such a bureau attached to the Interstate Commerce Commission that bureau would act as an intermediary——

Senator BLAIR. If there were such a law, which required a certain coupler, for instance, to be used, do you not think before there was such a law enacted you gentlemen would see that it required the best kind of coupler for the transportation interests?

Mr. BUCHHOLTZ. We would try to do so.

Senator BLAIR. You would certainly see to it, because the Government is simply reflecting the popular will, and you gentlemen would make the law. As it is now you try to make the law. You will make the law for yourselves when you get to that point of intelligence when you know what you want absolutely yourselves. You will then make it for your system of transportation, and for these others who are behind and who never catch up.

Mr. BUCHHOLTZ. I do not think so. Railroad companies do not have much chance in making laws. We are not very popular among the people or the States, or anywhere else.

Senator HISCOCK. Where these automatic couplers are used on freight cars, do you make up trains in which that mode of coupling and the hand coupling are both employed in the same train?

Mr. BUCHHOLTZ. Not if we can avoid it.

Senator HISCOCK. You make them up with the same kind of coupling all the way through?

Mr. BUCHHOLTZ. Yes, sir. If we did not I think the danger would be increased over the ordinary coupler. If you mix the two up you increase the percentage of risk.

Senator HISCOCK. That would be the effect of it?

Mr. BUCHHOLTZ. Yes, sir.

Senator HISCOCK. So that as you increase your automatic couplers that practically is an inducement, a necessity, of going on increasing as rapidly as you can?

Mr. BUCHHOLTZ. Yes, sir.

Senator HISCOCK. Do you know anything about the average of accidents on the trains where they are in use and where they are not?

Mr. BUCHHOLTZ. I can not state what the percentage is. In fact I do not know that data has been kept long enough for anybody to state. The automatic coupler has only been used within the last two or three years.

Senator HISCOCK. You do not think that there is at present any attainable data to show whether the percentage of accidents to human life or injury to humanity is less or greater on trains operated by the automatic couplers or on those that are not?

Mr. BUCHHOLTZ. No, sir; I think there are no statistics to prove that.

Senator BLAIR. What danger is there to a brakeman on a train which has the automatic coupler that does not exist on any other train?

Mr. BUCHHOLTZ. The brakemen do not have to step in between the cars.

Senator BLAIR. That is a danger that does not exist. What danger is there that does exist?

Mr. BUCHHOLTZ. There is no new danger.

Senator BLAIR. Then you say that the safety is not increased by the automatic coupler?

Mr. BUCHHOLTZ. Oh, no; I said it was increased.

Senator BLAIR. Do you think the automatic coupler is more dangerous?

Mr. BUCHHOLTZ. No, sir.

Senator BLAIR. Then it is very apparent why there should be no data collected as yet.

Mr. BUCHHOLTZ. There has been none collected as yet.

Senator BLAIR. To show that the automatic coupler is more dangerous?

Mr. BUCHHOLTZ. Oh, no.

Senator HISCOCK. My question was whether there was any data collected yet.

Mr. BUCHHOLTZ. No, sir.

Senator BLAIR. My question is to this effect, that if the automatic coupler simply removes a danger and does not produce a new one, it is quite absurd to expect any data to prove the contrary.

Mr. BUCHHOLTZ. Yes, sir.

Senator BLAIR. It is conceded that the automatic coupler is a better coupler?

Mr. BUCHHOLTZ. Yes, sir. There is one danger which arises from the carelessness of the men themselves. If the devices put on there should stick, the men would be very apt to step in between and look in there. There is no need of that; it is the man's own carelessness.

The CHAIRMAN. You think the automatic coupler should be improved and put in use by the railroads as far as possible?

Mr. BUCHHOLTZ. In a year or two it would be better.

Senator BLAIR. There is no coupler that is invented that will prevent a man from going in between two cars?

Mr. BUCHHOLTZ. I do not know; they ought not to go in between them.

The CHAIRMAN. If any legislation were enacted on this subject at all as to the adoption of devices for greater safety or otherwise, state whether it should or should not be uniform all over the country; that is to say, if a particular patent or device is adopted by your road and not observed generally, whether that device ought not to be uniform all over the country.

Mr. BUCHHOLTZ. It should be uniform in time. There may be differences in detail. The details may be left to the parties. There is the great difficulty; the difference in freight cars and their reasonable construction, and the different uses to which they are put makes the whole element one of difficulty. There are cattle cars, grain cars, coal cars, and gondolas—all these are special cars for special freights and have a special construction. Before a certain coupler is adopted a certain standard of car should be adopted. All these things should be adopted before the coupler is.

Senator REAGAN. If the Erie and Pennsylvania were to adopt the automatic coupler, would not that be a strong inducement for the other roads to do it?

Mr. BUCHHOLTZ. Undoubtedly.

The CHAIRMAN. The natural thing is for a uniform coupler throughout the country?

Mr. BUCHHOLTZ. Yes, sir.

The CHAIRMAN. Uniform on every road?

Mr. BUCHHOLTZ. Yes, sir.

Senator HISCOCK. So far as the automatic couplers and hand couplers are concerned in the matter of economy, taking into account the construction of the car and the coupling of them, which system is the more economical?

Mr. BUCHHOLTZ. The old system is more economical in the way of construction. These automatic couplers, I believe, amount to about $25 or $35 a car—about $25 a car. The old method only cost about $10 or $15.

Senator HARRIS. When you take into account the liability of the company for damages for injuries done to persons, how does that affect the question of economy in respect to the use of this improved style or the old style of couplers?

Mr. BUCHHOLTZ. I think any coupler that is better than the old one would be also more economical to the company in damages.

Senator BLAIR. You are not liable to a suit at law unless you are guilty of carelessness?

Mr. BUCHHOLTZ. Negligence.

Senator BLAIR. Do you consider it negligence to use the old-fashioned coupler?

Mr. BUCHHOLTZ. No, sir.

Senator HISCOCK. I understood you to say that the difference in expense between an automatic coupler and a hand coupler is about $20 to a car?

Mr. BUCHHOLTZ. A little less; about $15. Of course that depends largely upon what type you use.

Senator HISCOCK. I mean the most improved type.

Mr. BUCHHOLTZ. Between $15 and $18.

Senator HISCOCK. How many freight cars have you that are not supplied with them.

Mr. BUCHHOLTZ. Seventy-four thousand yet which are not supplied.

The CHAIRMAN. I thought there was a greater difference in the cost of equipment; that it took between $80 and $90?

Mr. BUCHHOLTZ. That is with both the air brake and coupler. They go hand in hand together. One necessitates the other.

Senator HARRIS. What do you say as to the safety and efficiency of air brakes on freight trains; do you think an air brake equally as efficient as any other system of brake?

Mr. BUCHHOLTZ. The power brake; yes, sir—more so.

Senator HARRIS. I would like to ask Mr. Ely as to the efficiency of an air brake on freight trains.

Mr. ELY. We think it is very efficient. We have it on ten thousand cars now. Of course we do not realize its efficiency and will not until most of the cars are equipped.

Senator HARRIS. The reason I asked the question is because we have testimony here introduced in the other direction.

STATEMENT OF W. C. BROWN.

The CHAIRMAN. Proceed, Mr. Brown, with your statement.

Mr. BROWN. I want to refer just a moment to the bill—I do not recall the number of it, but I think it is Senate bill No. 3692—which provides for the appointment of a commission by the President, by and with the advice and consent of the Senate, and I will preface my remarks on that bill with the statement that the Chicago, Burlington and Quincy has not an engine, either passenger, freight, or switch engine, that is not now provided with a power brake.

Senator REAGAN. What is the power brake as distinguished from the old brake?

Mr. BROWN. It is a brake that in our case is the Westinghouse air brake. I use the word "power" to distinguish it from the old hand brake. Five thousand, in round numbers, of our freight cars are equipped with air brakes.

The CHAIRMAN. Freight cars?

Mr. BROWN. Yes, sir. And about three thousand with Janney couplers. An appropriation of about $100,000 has been made this year by our company for the purpose of equipment. That amount

of money, we find, will equip six thousand six hundred and sixty-six freight cars, and if it is possible for the manufacturing establishments to furnish the brakes and the couplers, they will be put on this year.

Senator BLAIR. Equipped with brakes and couplers both?

Mr. BROWN. Yes, sir.

The CHAIRMAN. Over six thousand?

Mr. BROWN. Yes, sir. The appropriation was over $400,000, and in figuring up we found it would just equip 6,666 cars, and that number was ordered. In my judgment, the effect of this bill, Senate No. 3692, if it should be passed as it stands, will serve to at once stop all advances in this direction. The Chicago, Burlington and Quincy could not afford to spend $400,000 for something there was even a remote possibility this commission might upset. While I do not speak authoritatively on that subject, I think that the first effect would be to cancel our order for these improved couplers.

Senator HARRIS. Allow me to ask you if you think there should be any legislation whatever upon the general subject under discussion, and if so, state briefly what.

Mr. BROWN. I do not think that any legislation on this subject is necessary. I think that the only limit to the adoption of power brakes and the improved couplers will be the ability of the manufacturing establishments that are making these appliances to supply them. I question very much whether the Chicago, Burlington and Quincy will be able to get the appliances that we have already ordered. I do not know just how many we are behind—I think several thousand behind the orders now—and we find in our efforts to get them by crowding the manufacturing establishments which supply them that we are getting quite a percentage of poor material. That is always the result of crowding these manufacturing establishments with your orders.

It seems to me that there is another point in connection with any legislation on this subject, and that is a practical matter. There are only about two or three establishments in this country which are engaged in the manufacture of these appliances.

Senator BARBOUR. Do you make these appliances in your own shops at all?

Mr. BROWN. No, sir.

Senator BLAIR. Is not the fact that there is such uncertainty as to their work the reason why the American people are not ready to perform such work?

Mr. BROWN. I think not. It has been wonderfully stimulated in the last few years. There was nothing crystallized in this field until the brake and coupler tests, which were inaugurated by the Master Car Builders' Association, the first one of which took place at Burlington, on our road, during the summer of 1886. It was unsatisfactory, and the following summer another one was made, each one lasting nineteen days, and present at those tests were representatives from all over this country and from abroad, and every air brake and coupler that possessed any merit was thoroughly tested.

The CHAIRMAN. Are you familiar with the bill which provides for safety couplers and drawbars? Is there anything in that that would stop your work or have that tendency?

Mr. BROWN. I am not; but it occurs to me that there is objection to

that. One objection is the danger, if that law be passed and the railroad companies absolutely bound to comply with it under a penalty of very heavy fines, that the corporations owning these patents may increase the price of them as far as we have ordered our appliances; and another thing is that it is absolutely an unnecessary law from the fact that the railroads in self-defense are going to go faster than this law requires. Those which are not able to will be subject to a penalty because they can not do it. If they have not got the money they can not do it. There are a great many roads in the West that can not do it. They would have to pay the penalty or go bankrupt, or wait for an extension of time.

I want to say a word in regard to the appliances themselves. I have been for something more than twenty years intimately associated with that particular class of the service—that is, freight brakemen. I was on the Chicago, Burlington and Quincy when we first introduced the air brake and Janney coupler.

The CHAIRMAN. As a brakeman?

Mr. BROWN. No, sir; as a trainmaster. It is my opinion, eliminating entirely the question of life and limb, that it is in the interest of economy for the railroads to adopt these appliances just simply in the immunity which they give them from damages to persons and property by accident.

The CHAIRMAN. How as to taking into account life and limb?

Mr. BROWN. I do not think that it can afford to do anything else.

The CHAIRMAN. As quickly as possible?

Mr. BROWN. Yes, sir.

The CHAIRMAN. What is your present position in the railroad company?

Mr. BROWN. I am superintendent in charge of the lines of the Chicago, Burlington and Quincy in Iowa and Missouri. My headquarters are at Burlington, Iowa.

The CHAIRMAN. Have you anything further to say?

Mr. BROWN. Nothing further unless there are some questions which I can answer.

The CHAIRMAN. You think it would be unwise to pass any of these bills?

Mr. BROWN. I do, sir.

The CHAIRMAN. Or enact any legislation, the purpose of which is to interfere with the freedom of the railroads to proceed with the equipment of their cars as their own judgment dictates?

Mr. BROWN. I think so; I think the first effect, and I know as a practical matter that that has been the effect, would be to measurably relieve the managers of railroads from the responsibility which they now have, because they could say "the Government has taken hold of it and there is no use in our further prosecuting it."

Senator HISCOCK. You do not approve of any law establishing a board of Government inspectors?

Mr. BROWN. I have not given that question much thought. As I listened to the suggestions and questions this morning it occurred to me that the most practical one and the one that would be best for both the roads and the people is the one suggested by Senator Harris, that the recommendations of the master car builders be adopted by the roads.

The CHAIRMAN. But not by Congress?

Mr. BROWN. No, sir.

The CHAIRMAN. Would you favor the enactment of a law requiring the railroads to accept suggestions of the Master Car Builders' Association?

Mr. BROWN. No, sir; I would oppose it on the ground that no legislation is necessary, assuming that some bill is going to be passed, and I think that is the practical solution of the question.

Senator HISCOCK. Take this question of a board of experts who are to make suggestions, to examine and educate Congress on that subject; what would be the effect of that upon the railroads in reference to their delaying their work, and delaying their improvements, to see whether they might not be antagonized by legislation?

Mr. BROWN. I think that would be the direct result, to postpone and defer improvements of this kind; to retard progress.

Senator HISCOCK. The moment you had a supervisory board, or one which might exercise at least a moral influence over the question, it might result in individual enterprise waiting until the board decided.

Mr. BROWN. Yes, sir; there is another thing, that no board of that character not constantly and intimately connected with the work of railroads, as our master car builders are, could be anything like as thoroughly equipped for anything of that kind as the committees of the Master Car Builders' Association are.

Senator BLAIR. What would be the effect of a law providing that on and after a given date, in an action at law for damages by employees or other persons against a corporation, the failure of a railroad corporation to have provided its cars with automatic couplers and power brakes—of course with the best one or ones that are reasonably good—should be prima facie evidence of negligence on the part of the railroad corporation?

At 12 o'clock m. the committee took a recess until 2 p. m.

At the expiration of the recess the committee resumed its session.

The CHAIRMAN. You may proceed, Mr. Brown.

Mr. BROWN. I would like to have Senator Blair's question repeated.

Senator BLAIR. It was to this effect. You have stated the objections to legislation, and one very forcible suggestion you made was in the form of fact, as I understood you to state, that the agitation of this question in Congress had already disinclined roads that were proceeding to put on this coupler and make these improvements in the direction of safety to go further until they saw what was coming of this, and whether an expenditure would be found useless and in the end they would be compelled to substitute something else than that which should be prescribed by law, and you thought it would be universally so, and the existing developments would be arrested by agitation.

Mr. BROWN. Yes, sir.

Senator BLAIR. And if there were a law passed you thought they would not be enterprising in devising ways and means for improvements, but would try to conform to law and put the responsibility upon us. I asked you how it would do to leave this process of improvement unfettered, but to require that in the case of the coupler, for instance, that an automatic system should be applied to all the cars within a prescribed time, say three years or five years, whatever

is necessary and reasonable, and after we did to make the fact that such coupler was not used by a given road prima facie evidence, until rebutted, of negligence on the part of the corporation when an accident should occur and a suit for damages be brought for the injury to workmen or to other parties injured. That would then leave the roads free to pursue the adoption of means of safety in their own way, which was best for their interest, for the necessary length of time to make the changes, and after that if they had not made the changes, then they would be guilty of negligence as a conclusion of law.

Mr. BROWN. I think it might in fact hurry the adoption of these devices to some extent. Still I think it would be a very oppressive law, one that might be applied to a great many other things. For instance, there are interlocking devices, which if used will prevent collisions at crossings where one road crosses another at grade. There are interlocking block signals which will prevent, if they are used, rear-end collisions. There are a great many inventions of this kind, and it goes without saying that it is absolutely impossible for railroad companies to adopt all of them at once.

If these bills should become laws, it means that a great many of these inventions, which are necessary and which are being pushed forward in connection with others, will all have to be dropped and the couplers and the air brakes be given precedence over everything else. So far as life and limb of employees are concerned, they may and perhaps would take precedence. In so far as the safety of passengers and the general public is concerned, there are other inventions which are equally important as these. For instance, in Chicago it has become a necessity and all the roads are moving in the direction of elevating their tracks, or depressing, I should say—elevating the streets and making viaducts or depressing their tracks, going down under. Whatever they decide on will cost a very large amount of money. Our company in Illinois alone is now contemplating the expenditure of between one and two hundred thousand dollars in other safety appliances, which in the judgment of the management are just as necessary as the air brakes and the couplers, and my thought was if this law which you suggest should be enacted that it would form a precedent for making the nonuse of a great many other things prima facie evidence of negligence and would be burdensome and unjust to the railroads.

At 2.30 o'clock p. m. the committee adjourned until to-morrow at 10 o'clock a. m.

WASHINGTON, D. C., *May 15, 1890.*

The committee met at 10 o'clock a. m. pursuant to adjournment.

STATEMENT OF W. C. BROWN—Continued.

The CHAIRMAN. Are there any facts which you wish to get before the committee or any views you wish to express?

Mr. BROWN. Yes, sir; there are one or two thoughts on the general subject.

I stated in reply to a question that I thought this class of legislation was unnecessary, and I think as a pratical matter it is unwise.

I think it is unnecessary, because all the roads of the country are moving in the direction sought by these bills as rapidly without legislation as it will be possible for them to move in pursuance of legislation.

I think the fact that the railroads of this country are so far in advance of the railroads of other countries in the improvements which have been made in the service, in the adoption of safety appliances of all kinds, is to a very great extent attributable to the fact that the management of the roads of this country have felt the responsibility resting on them of investigating the different inventions and adopting them as fast as they were proven to be successful and they could raise the money to do it.

I think it is a fact which no person who is familiar with this subject will dare to deny that the roads in other countries where they are either owned by the Government or controlled by the Government to a very much greater extent than in this country are very much behind the roads in this country. My reason for saying that in my judgment this class of legislation would be unwise is this, that the moment the Government steps in and attempts to go into the details of the management of our railroads, as does this bill, that that is the opening door to that class of legislation. It seems to me that the moment the responsibility to some extent would be lifted from the railroads, the management of the railroads, and there will be this distribution of responsibility whenever an improvement is suggested and the question is agitated, the reply will at once suggest itself to the management that the Government has taken hold of it. "Even if we should take hold of it they may step in and suggest something else or pass a law compelling us to do something else."

The CHAIRMAN. So that in your judgment, to sum it all up, you think such legislation is unwise, looking to the question of the progress of the railroads in bringing about what the bills on their face seek; that there is danger that it would retard rather than hasten the improvements that we are trying to secure the adoption of to-day by legislation.

Mr. BROWN. Yes, sir. I do not think there is any doubt about it. It seems to me that those who are familiar with the progress which has been made in this country without legislation should recognize that and give the roads credit for the probability that they will continue to make progress in improvements, inventions, that are already devised and those which shall be in the future.

The CHAIRMAN. Now, Mr. Brown, the Pennsylvania Railroad people stated that they had about one-tenth of their freight cars improved, so as to comply with this proposed legislation. The Erie people stated they had six thousand out of forty thousand, and then the Chicago, Burlington and Quincy—what per cent was yours?

Mr. BROWN. At the close of the year 1890 we will have 25 per cent of our entire equipment. Understand me that every engine we have now is equipped in compliance with this proposed law.

The CHAIRMAN. As to the air brake?

Mr. BROWN. Yes, sir; and 25 per cent of our entire equipment at the close of the year 1890, if we can get the material. Our orders were placed early this year. We will have 25 per cent of our cars equipped. I wish to make the same explanation that the Pennsylvania people did, that so far as the Chicago, Burlington and Quincy is concerned we are out of the question entirely.

The CHAIRMAN. You can do what is required?

Mr. BROWN. We will anticipate every requirement of these bills. We will have complied with every requirement of these bills before the date fixed in the bill.

The CHAIRMAN. Now, what I want to get at is this: Just what proportion of the railroad cars of the country—there are about a million cars—what proportion of those cars are now adopting and have adopted this improved method or these improved appliances? Have you any idea?

Mr. BROWN. Any reply that I would make to that would necessarily be guesswork.

The CHAIRMAN. What other road—do you know of any except those which have been represented here and which have been spoken of—is doing anything?

Mr. BROWN. Yes, sir; the Atchison, Topeka and Santa Fe have a larger proportion of their cars equipped with the brakes and couplers than either the Pennsylvania or the Chicago, Burlington and Quincy.

The CHAIRMAN. A larger proportion?

Mr. BROWN. Yes, sir; the Union Pacific and Central Pacific have a large number. I would not attempt to give the percentage of their equipment. They have a very large number. The Northwestern has a great many, and their general superintendent, M. Whitman, says that they are putting them on just as fast as they can get the material.

Senator WILSON. Have the companies any system for the collection of statistics in respect to the application of these improvements and appliances by the different roads of the country?

Mr. BROWN. Yes, sir; there has been in existence for some nineteen years an association called the Master Car Builders' Association, which meets every year. They have for five or six years had this particular subject under consideration. Four years ago a committee consisting of the most able members of that association, representing roads in the Eastern, Middle, and Western States, was appointed to take this matter up. Perhaps the Senator is familiar with it; at any rate he has heard of the two brake tests which were held near Burlington.

Senator WILSON. Yes, sir.

Mr. BROWN. Those brake tests and coupler tests occupied some nineteen days in 1886 and 1887, and were for the express purpose of testing the different devices in the way of safety couplers and power brakes. The committee to which I refer—I do not know that it is necessary to give the names, but they represented——

The CHAIRMAN. Are they permanently appointed or changed from year to year?

Mr. BROWN. This committee concluded its work in 1887, reported in favor of the type of coupler which the Pennsylvania, the Chicago, Burlington and Quincy, the Chicago and Northwestern, the Atchison, Topeka and Santa Fe, the Southern Pacific, and the Union Pacific have since been putting in use.

The CHAIRMAN. They all adopted the recommendation of the committee of the master car builders?

Mr. BROWN. Yes, sir.

Mr. WILSON. What is the date of the last report of that association?

Mr. BROWN. I think it was June of last year. They have not yet had their annual meeting this year.

Senator WILSON. Does that report give the percentage of cars on the different roads in the country to which these appliances have been applied?

Mr. BROWN. I think it does. I know that when this question was up it was gone into carefully. This committee of eight reported in favor of the Janney type of coupler—not the Janney coupler, but simply that type. It is a vertical hook coupler. The report was received by the association and referred to the various roads in interest with the request that they vote by what was called letter-ballot, each road having a certain representation based on one vote for every one thousand freight cars operated by that road.

The ballots were counted in New York on the 13th of October, 1887, and there were in the neighborhood of half a million cars represented at that time. That was three years ago this coming October. Four hundred and seventy-four votes were in favor of the adoption of this coupler and one hundred and ninety-four votes were against it. The coupler of that action was recommended for adoption by the roads, and the work has been going on. I think it is safe to say that the only limit has been the capacity of the manufacturing establishments to get out the work. They are way behind in our orders to-day.

Senator WILSON. Can you state the proportion of roads that have adopted it; that is, practically adopted it?

Mr. BROWN. No, sir.

Senator WILSON. By attaching it to their cars?

Mr. BROWN. I can not state it definitely; but I should say a majority.

Senator BLAIR. What proportion of the transportation of the country is done in such cars?

Mr. BROWN. I can not say. But the Chicago, Burlington and Quincy is, as you know, one of the great transcontinental lines, and I think I am safe in saying that fully one-half of our freight trains now have enough power brakes, Westinghouse air brakes, to control the movement of those trains without any assistance from the brakemen. We have frequently solid trains of 25 and 30 cars, on every single car of which is an air brake.

Senator BLAIR. Do you put the coupler wherever you put the brake?

Mr. BROWN. Yes, sir.

Senator BLAIR. Those two go together with you?

Mr. BROWN. Yes, sir.

Senator BLAIR. You do not separate the coupler from the brake?

Mr. BROWN. No, sir.

Senator BLAIR. How does it happen in this movement the coupler and brake are separated?

Mr. BROWN. Because the coupler as compared to the brake is a new thing.

Senator BLAIR. And has a more direct bearing upon the matter of safety than the brake. In other words, which conduces more to the safety of operating the train—the new coupler or the new power brake?

Mr. BROWN. In reply to that I should say that so far as the prevention of accidents to the trains, collisions, and that class of accidents——

Senator BLAIR. Those things which involve human life and limb is what I have reference to.

Mr. BROWN. In preventing accidents to brakemen or pinched hands and accidents of that kind——

The CHAIRMAN. The coupler is the more important?

Mr. BROWN. The coupler is the more important.

Senator BLAIR. To human life regardless of whether it be a brake or something else.

Mr. BROWN. I think the brake is more important.

Senator BLAIR. These two ideas are cognate and go together?

Mr. BROWN. Yes, sir; I think the one should go with the other.

Senator BLAIR. You treat them as such in your dealing with the problem?

Mr. BROWN. Yes, sir; and further, the brake can not be used on a long train, of thirty-five to fifty cars, without the coupler.

Senator BLAIR. Can not be used?

Mr. BROWN. No, sir.

Senator BLAIR. The coupler can be used without the brake?

Mr. BROWN. The coupler can be used without the brake; but the brake can not be used without the coupler.

Senator BLAIR. Can you explain in a moment why that is so on a long train and is not so on a short train?

Mr. BROWN. The brake is applied at the front of the train, and with six inches of slack between each of the cars when that brake is applied to the front end it would derail the cars at the rear end of that train when that slack comes together.

Senator BLAIR. How many feet would that be? It would depend upon the length of the train: six inches to the car?

Mr. BROWN. Yes, sir; I think that is a fair average.

We have had that applied a number of times. At the test at Burlington we have had cars thrown off the track. The force sheared the kingbolt. We had cars loaded with car wheels, and the car wheels went right through the cars when the stop was made.

Senator BLAIR. Then the brake does not apply its power instantly to every car the entire length of the train?

Mr. BROWN. It is impossible. They have made improvements so that it more nearly approximates that than it ever has before, but still it has not reached perfection yet.

Senator BLAIR. There is no such thing as an electric application, or the application of electricity to brake the trains?

Mr. BROWN. None that I think is practicable. There is such a device, but it is a very intricate, complicated affair, and I do not think it would be practicable.

The CHAIRMAN. I think some one testified before the committee here that where these couplers and brakes, or one of them at least, were used on freight trains that they still had to retain their brakemen, just as usual, on the freight cars in running trains. Is that so with your road, in your experience?

Mr. BROWN. That is true. There are several reasons for that. There is always more or less work to do. If there is any switching to do; if it is necessary to sidetrack to get out of the way of other trains; if a car breaks down or an accident of any character happens that detains the train, it is necessary to send a flagman back to warn

the train and stop it, so as to prevent rear-end collisions. There are frequent cases of hot boxes that have to be packed, and I think it is always necessary to keep three men on the freight trains, which we have.

Senator WILSON. I suppose there might occasionally be an accident to the brake itself?

Mr. BROWN. Yes, sir.

The CHAIRMAN. Here is a freight train with thirty cars. Under the old system, without the air brakes at all, as I understand it, how many brakemen would you have on a train of thirty cars?

Mr. BROWN. A conductor and two brakemen.

The CHAIRMAN. On that length of train?

Mr. BROWN. Yes, sir.

The CHAIRMAN. Now you have the same number still?

Mr. BROWN. Yes, sir.

The CHAIRMAN. And you would have the same number if the train were shorter—half the number of cars?

Mr. BROWN. Yes, sir.

The CHAIRMAN. So that you are saving no labor by the adoption of the new appliances?

Mr. BROWN. Nothing at all.

Senator WILSON. That is an equipment in the matter of force that is induced by the possibilities of what may happen to a train whether it is equipped with these improvements or not?

Mr. BROWN. Yes, sir.

Senator BLAIR. Is there any inconvenience or increased or lessened danger resulting from the combination of cars, some with the old coupling and others with the new coupling in the same train. Can you use the old and the new method of coupling on the same train?

Mr. BROWN. Yes, sir; we do it right along.

Senator BLAIR. And with no difficulty?

Mr. BROWN. I do not think it increases the danger materially; I should say not.

Senator BLAIR. Is there anything in this direction—that having two systems tends to lessen the degree of skill on the part of the brakemen in the management of trains; say, for instance, the old coupling by stepping in between the cars, their skill must be the result of continuous practice, I should think. Now, introducing or mixing the two systems, do you find the brakemen just as skillful and efficient and as liable to protect themselves from danger as they were formerly when you had only the old method?

Mr. BROWN. I think it has made no difference. We have had less men hurt, because, as the new appliances are adopted, there is less danger. There is no necessity of going over the tops of trains or between cars.

Senator BLAIR. Speaking of the tops of trains, there has been a brakeman here who described very vividly the dangers resulting from the shape of the top of the car, especially when there is sleet, it becoming very slippery, and the necessity of traveling upon the tops of the cars dark nights. Could there be nothing done to provide a more secure passage across the top of the train? It slopes both ways, and it is like a man on the roof of a house.

Mr. BROWN. The slope is slight, and there is a running board

which is perfectly flat along the center of the car, and I do not think that anything could be done in that direction.

Senator BLAIR. What real objection is there to changing the height of bridges, so that a man might pass along on the top of a train without having his head knocked off?

Mr. BROWN. I do not know. Under the Burlington system there has not been a man hurt that way.

Senator BLAIR. Ought not that to be universally so? Why should railroads build their bridges so low? There would be a less expense if they built them so that that danger would disappear.

Mr. BROWN. In some cases that might be true. Where one road crosses another, if you raised it it would involve raising it on both sides. I have known cases where it would be——

Senator BLAIR. Those would be very few and far between. You have not such a case on your road?

Mr. BROWN. No, sir.

Senator BLAIR. How long is your road?

Mr. BROWN. About 7,000 miles.

The CHAIRMAN. You will have when you get to elevating and lowering your road in cities.

Mr. BROWN. That may be. Still that danger will be obviated to a very great extent when the power brakes are used.

Senator BLAIR. Then that is an additional reason for its adoption?

Mr. BROWN. Yes, sir.

Senator BLAIR. In the direction of expense to them?

Mr. BROWN. Yes, sir.

The CHAIRMAN. Let me ask you another question. You have been closely identified with the employees of railroads, brakemen, etc. What is the feeling among the men employed with reference to this subject?

Mr. BROWN. I know they are all very anxious to see that these improvements are made. It not only gives immunity from danger, but it reduces to a minimum the work connected with the position of conductor or brakeman.

The CHAIRMAN. Is it their judgment that legislation ought to be enacted on the subject?

Mr. BROWN. I have not heard on opinion expressed, except in regard to these bills which contemplate the establishment of a commission to investigate the matter, which in their judgment had been thoroughly investigated by the master car builders.

The CHAIRMAN. There is no use of that?

Mr. BROWN. It is the judgment of all that that would have a tendency to retard rather than expedite the adoption of the improvements.

STATEMENT OF J. E. LOUGHRIDGE.

Mr. LOUGHRIDGE. Mr. Chairman and gentlemen of the committee: After listening to the very intelligent arguments of yesterday and to-day, made by some of the most distinguished and representative railway men of our country, I confess to a very considerable embarrassment in attempting to define my status before you. I asked the privilege of appearing before you as the representative of the Loughbridge Brake and Car Company, of Philadelphia. To-day

I beg that I may be received as a representative of the large army of unorganized, unrecognized—I might say unappreciated—inventors, and my brief remarks will be in the direction of an appeal to you to avoid in the legislation proposed anything in favor of special devices. I was accorded the privilege of appearing before the House committee on April 21 in regard to House bill No. 6950, presented by Hon. R. P. Flower. This bill, in its enacting clause, openly and unqualifiedly declares in favor of mandatory legislation compelling railroads to equip their cars with automatic air brakes.

The CHAIRMAN. What bill do you refer to?

Mr. LOUGHRIDGE. The bill presented in the House by Mr. Flower. I apprehended that bill was before you to-day, but I find it is not. As this bill is not now before your committee, I want to ask your critical attention to the bill before you, presented by Senator Allison, and ask you if this bill, which is identical with House bill 9682, presented by Mr. Henderson, does not make automatic brakes as compulsory as does the Flower bill?

This bill presented by Senator Allison in section 4 says:

SEC. 4. That it shall be unlawful for any corporation, company, or person operating a line of railroad in the work of interstate commerce to run any train in such work after the 1st day of January, 1893, that shall not have enough cars in such train equipped with some kind of power or automatic brake, so that the engineer upon the locomotive can control the train, as passenger trains are now controlled by the engineer, without requiring brakemen to go between the ends or on top of the cars to use, as now, the common hand brake.

I will say right here that the expression "some kind of power or automatic brake" would probably be construed to mean any power brake, automatic or nonautomatic, if left without constructive comment as in bill No. 3692. Bill No. 9682 construes the intent and purposes of the bill to be—and I quote the words: "To make automatic brakes compulsory," when in section 5, lines 17 and 18, it states, "or from a lack of such proper and efficient automatic brakes as contemplated in this act"—not power brakes, or power and automatic brakes, but automatic brakes *per se*—and mark the words, "as contemplated in this act."

Again in section 7, lines 5 and 6, "with such automatic safety appliances as contemplated in this act." In lines 9 and 10, "with such automatic safety appliances as will work," etc.

Now, I know that the parentage of this bill is due to Mr. Coffin, and I am as confident as I am of anything that Mr. Coffin had no intention whatever to give any prestige or favor to any one particular appliance. His association has been with automatic brakes, and the wording and the contemplation expressed in the bill was perfectly innocent on his part, I am sure, for I want to take the liberty of saying that every brakeman, employee, and manager in this country that I know of is perfectly willing to trust the matter to Mr. Coffin as far as fair treatment goes.

Now, gentlemen, what I may have to say further will be mainly in relation to power brakes. I am very glad to note that all the railroad gentlemen here treat the matter, Mr. Brown particularly, as power brakes.

The CHAIRMAN. What is the difference between a power brake and an automatic brake?

Mr. LOUGHRIDGE. An automatic brake is a power brake, but a power brake is not an automatic brake.

In order that I may have the confident hearing of this committee, I beg to make the personal allusion that I aided in the equipment of the first train of cars with power brakes, where adoption of the system almost immediately followed. That was in 1856 on the Pennsylvania Railroad, which then, as now, is always the pioneer in practical safety appliances. This was then known as the Loughridge (my father) chain brake. I think every passenger car on the Pennsylvania Railroad was at one time equipped with this system, and I can not avoid here alluding to the fact that a material element of that invention to-day obtains on all their freight cars in braking from truck to truck by hand brakes.

Just here it would be probably pertinent for me to try to emphasize some of the remarks of several of the gentlemen made yesterday, particularly Mr. Brown, in regard to the possible early development of systems now conceded as not perfect.

I have been identified with brakes from 1856 up to the present time, almost immediately connected with the development of brakes. Since that time the Pennsylvania Railroad Company has adopted three different systems, and have gone to the expense of three different equipments: first, the old chain brake, the Loughridge brake, which was succeeded by the better straight air brake of the Westinghouse Company. The whole road is equipped with that brake. When in the fullness of time the automatic brake was invented, the Pennsylvania road just threw off their equipment of straight air and put on the automatic, believing it to be better. In a very short time there have been three different appliances at a very heavy expense. As a brake expert, which I am called, I believe, at home, I know that the legislation which has been proposed here, that the agitation that has resulted from these proposed bills has awakened inventions, and I have had within the last ten days in Philadelphia certainly half a dozen inventors come to me as a brake expert with brakes, automatic and nonautomatic, some patented and some in the course of investigation. At the same time I have had a great many couplers presented to me.

I wish to remark right here that even should no bill be passed and become a law, you can rest assured that the agitation which has occurred has greatly stimulated invention, not only in brakes but in couplers. I do not think I ever saw so many applications. Patent agents in Philadelphia with whom I am familiar tell me that they have never in their experience had so many applications for couplers and brakes as they have had within the last three or four months.

The CHAIRMAN. We have done some good, then, if we have not gone any further.

Mr. LOUGHRIDGE. We understand that the object of this bill is to enforce by national legislation the early adoption by railroads of such appliances as will give greater security and protection to the lives and limbs of trainmen. In this direction the automatic coupler is perhaps essential, as its adoption will, or should, by its automatic action, relieve trainmen from going between cars during the act of coupling and uncoupling. The automatic functions of car couplers are so plain and so readily appreciated in their relation to protection

to trainmen, that we believe a very great number of people unskilled in the handling of trains assume that the same protective functions attach to automatic air brakes. Such, however, is not the case. There is nothing in the automatic feature of air brakes that can be claimed as a protection to trainmen, as compared with other systems of continuous power brakes. On the contrary, the complications of the automatic air-brake system are such as require trainmen to perform very dangerous duties, similar to those which the automatic coupler seeks to avoid, namely, to go between the cars and under the buffers to couple or uncouple the air-brake hose, and in switching in or out cars the trainmen must crawl under the buffer or stand between the cars and reach over the buffer to close the cocks. Besides this, it is daily necessary for trainmen to go under the cars to either bleed the reservoirs or adjust the cock at or near the triple valve, and there can be no question that these requirements would injure more men than the system as a whole would protect.

We do not propose, without your request, to go into the mechanical details of the automatic air-brake system to confirm by mechanical demonstration of our statements, or to compare it with other systems now in use or seeking the patronage of railway managers, but as national legislators we ask your most careful consideration of the following points:

(1) The final passage of either bill as presented would be special legislation in compelling railroads to adopt one system of brakes which might or might not be desirable for general freight service; a system that might be available for roads of ordinary gradients and be utterly impracticable for roads of heavy grades.

(2) It would compel roads now using more satisfactory systems of continuous power brakes to go to heavy expense in change of equipment.

(3) It would compel the use of a system practically controlled by patents in the hands of one company, and would be direct legislation in favor of a monopoly.

(4) It would compel railway companies to pay any cost of equipment that such monopoly might demand.

(5) It would enable railway companies to plead such legislation in bar to any claim for damages that might be traceable to the inherent defects in the system of brakes.

(6) It would be a declaration to all inventors to stop any further effort in electric, momentum, or other brake motor experiments, for the reason that the compulsory legislation once enacted could not be readily repealed.

(7) It would limit any improvement to a very narrow circle, and that practically covered by patents granted to and absorbed by one agency.

We submit that the passage of such a bill as named would not only be special and mandatory in character, but would make compulsory the adoption of special appliances, which the Master Car Builders' and Master Mechanics' Railway Associations of the United States not only refused to indorse, but refused to recommend. The Master Car Builders' Association recommended the adoption of the Janney type of coupler, and it was confirmed by letter-ballot. Would it be legal or just for Congress to pass a law making the adoption of the Janney

type coupler compulsory, and thereby wipe out the competition of the hundreds of other, and, perhaps, better automatic couplers now in use in experimental trial, or by adoption?

We ask, gentlemen, in full view of the object sought to be obtained by the proposed legislation, what possible advantage can be achieved by the use of the word "automatic" in connection with brakes in any of the bills before you? An automatic brake is necessarily a power brake, but a power brake is not necessarily an automatic brake. Under the phraseology of "continuous power brakes," or even "power brakes," the automatic system would have as full opportunity for demonstrating its availability as it would under the special mention in each of the bills before you.

We submit to you, gentlemen, that the use of the word "automatic" in any way in connection with brakes in the proposed legislation would be giving at least a prestige to a special appliance that is not warranted by any superior mechanical advantages attaching to the method.

Senator BLAIR. May I ask you right there a question?

Mr. LOUGHRIDGE. Yes, sir; certainly.

Senator BLAIR. "Brake" is the generic term?

Mr. LOUGHRIDGE. Yes, sir.

Senator BLAIR. Power brakes and hand brakes. What is the subdivision; what is automatic, that is, a power brake?

Mr. LOUGHRIDGE. Yes, sir.

Senator BLAIR. Not a hand brake?

Mr. LOUGHRIDGE. No, sir; it is a continuous power brake.

Senator BLAIR. What are the other divisions of power brakes?

Mr. LOUGHRIDGE. Automatic air brake and automatic vacuum brake.

Senator BLAIR. An automatic air-power brake?

Mr. LOUGHRIDGE. An automatic air-power brake; the Westinghouse. The brake that has been alluded to in all the conversation here is an automatic air brake. It is a power brake. It is an automatic air-power brake, or an automatic air continuous power brake.

Senator BLAIR. Any automatic power brake is not operated by hand?

Mr. LOUGHRIDGE. It is operated by the engineer.

Senator BLAIR. It is not operated by the hand of the brakeman?

Mr. LOUGHRIDGE. No, sir.

Senator BLAIR. The hand brake is confined to the single car and operated by some one on that single car?

Mr. LOUGHRIDGE. Yes, sir; with the wheel of the windlass at the other end of the car. The power brake is a brake operated by the engineer by the force of some elastic fluid or vacuum, or whatever you choose to call it. There are a number of appliances under the head of electric, momentum, and automatic, all of which would come under the head of continuous power brakes.

Senator BLAIR. What way has the engineer of operating this power brake except the automatic?

Mr. LOUGHRIDGE. He would operate it by straight air. As a great many trains are on heavy grades it would just be the reversal of the heavy system. The engineer in applying the heavy brake exhausts the air from his pipe and performs an automatic connection between

the triple valve and the cylinder. In the straight air the engineer carries his air condensed in the reservoir on the engine.

Senator BLAIR. That is condensed air?

Mr. LOUGHRIDGE. Yes, sir; straight air.

Senator BLAIR. It shoots a column of air the length of the train which applies the brake?

Mr. LOUGHRIDGE. Yes, sir.

Senator BLAIR. In the other case the atmospheric pressure fills the vacuum?

Mr. LOUGHRIDGE. Yes, sir; it creates a pressure upon the heads of the cylinders.

Senator BLAIR. How does he create a vacuum?

Mr. LOUGHRIDGE. By an injector, an injector of steam, which draws the air from the pipe, exhausting the air through the pipe.

Senator BLAIR. That vacuum is continuous and constant, and when you apply the brake there is a valve lifted and the air rushes into the vacuum.

Mr. LOUGHRIDGE. In the automatic vacuum there are various devices, the ball valve and the pipe valve, and a number of devices in the automatic.

Senator BLAIR. The most general division, to give us an idea of the meaning of those terms, is the hand brake, which is operated singly on the cars by the brakeman or the individual, and the other operated by the engineer: that is the power brake.

Mr. LOUGHRIDGE. Yes, sir.

Senator BLAIR. The power is divided into automatic and various other forms?

Mr. LOUGHRIDGE. Yes, sir. The power brake would take in electricity, atmospheric combinations, the vacuum, straight air, chain brakes, and a number of others. I think in England they have five or six kinds of brakes in operation under the head of continuous power brakes.

Senator BLAIR. The automatic power brake, as I understand you, is one which operates by the creation of a vacuum?

Mr. LOUGHRIDGE. No, sir; it does not act by the creation of a vacuum. It operates by storing the air under each particular car, in a reservoir under each particular car. That is held trapped in that reservoir by means of what is known as the tripple valve. When they get a storage power of 70 pounds in this reservoir, or these auxiliary reservoirs, as they are termed, under each car, an equilibrium forms between the pipe and the reservoir. This triple valve closes and holds the air in the reservoir.

Senator BLAIR. Is it condensed?

Mr. LOUGHRIDGE. It is compressed to 70 pounds to the square inch. That is the normal condition of it. When the engineer wants to apply his brake by the automatic method he exhausts, say, 10 pounds of air from this drain pipe at his engine. That pipe is at his engine. When that reduction occurs in the pipe the triple valve opens the communication automatically between the reservoir and the cylinder and it is the piston in the cylinder which actuates the brakes. When this reduction takes place and this triple valve opens between the reservoir and cylinder, the brakes go on just in proportion to the

pressure that is in the reservoir, or the pressure that has been reduced in the drain pipe. That can be reduced from 10, 15, 20 up to—well, about 20 pounds, which is all that is required to get the pressure.

The CHAIRMAN. I understand that you are opposed to these bills. Are you opposed to any legislation on the subject? And if not, state for what you are here.

Mr. LOUGHRIDGE. I am here to criticise the special legislation contained in that bill presented by Mr. Allison giving a prestige to, at least, if it does not make automatic brakes mandatory.

The CHAIRMAN. You want the word "automatic" stricken out wherever it occurs?

Mr. LOUGHRIDGE. I think it is a fair request for all future inventions, because it does not condemn or criticise any other brake. You have heard gentlemen speak here of power brakes altogether; but automatic means a special appliance now in force and under the control of one agency.

Senator WILSON. If the bill were amended in that respect as you suggest, would you then be in favor of the enactment of this bill into a law?

Mr. LOUGHRIDGE. Yes, sir.

Senator BLAIR. How about the automatic coupler?

Mr. LOUGHRIDGE. A coupler must be automatic. There is where I fear you gentlemen get the two mixed. The functions are entirely different, but a coupler must necessarily be automatic to accomplish what it is intended to do.

Senator WILSON. That is, a coupler which acts by itself and closes upon two cars coming together?

Mr. LOUGHRIDGE. Yes, sir.

The CHAIRMAN. You come here simply as an inventor, and all you desire is that whatever legislation is enacted shall be so construed as that it shall not definitely settle the character of the brake which shall be adopted. The coupler, as I understand, you do not make any question about?

Mr. LOUGHRIDGE. No, sir.

The CHAIRMAN. That is what you are after?

Mr. LOUGHRIDGE. Yes, sir; that is it exactly. There are thousands and thousands of automatic couplers. The Janney type takes in I do not know how many. Mr. Brown could probably tell you—fifty or one hundred of that particular type.

Senator BLAIR. What is the idea of the Janney type?

Mr. LOUGHRIDGE. It is a vertical-plane type, a hook.

Mr. Chairman, you expressed fully and clearly my object in being here, and all I ask is that we inventors have a fair chance, and not be handicapped by legislation.

The CHAIRMAN. You are not particularly concerned as an individual whether a bill is passed or not; but if one is passed, you do not want to confine it to any special patent or appliance?

Mr. LOUGHRIDGE. Yes, sir; that is it.

ADDITIONAL STATEMENT OF L. S. COFFIN.

Mr. COFFIN. Mr. Chairman, in the first place, I desire to place myself in my proper position before you, and I wish to introduce, first, this letter, which I will read:

BROTHERHOOD OF RAILROAD BRAKEMEN,
OFFICE OF THE GRAND SECRETARY AND TREASURER,
Galesburg, Ill., U. S. A., December 23, 1889.

MY DEAR FRIEND: You are hereby authorized to represent the Brotherhood of Railroad Trainmen in all matters pertaining to power brakes, automatic couplers, and other safety appliances, also Sunday rest.

Most respectfully,

[SEAL.]

S. E. WILKINSON,
Grand Master.
W. A. SHEHAN,
Grand Secretary and Treasurer.

Hon. L. S. COFFIN,
Brooklyn, N. Y.

Last night I received this letter [exhibiting]. The letter will explain itself. Here is the seal of the lodge. Here are the names of these grand officers [exhibiting].

GRAND LODGE OF THE BROTHERHOOD OF RAILROAD TRAINMEN.

OFFICE OF GRAND SECRETARY AND TREASURER,
Galesburg, Ill., May 12, 1890.

Hon. L. S. COFFIN,
Washington, D. C.

DEAR SIR: We have carefully examined H. R. 9682 and are convinced that it fully covers the ground and if made a law will have the effect of saving the lives of thousands of trainmen.

I hope the committee will understand that I am now voicing the men who handle these cars.

The CHAIRMAN. What bill do you refer to? Senator Allison's bill?

Mr. COFFIN. Yes, sir; Senator Allison's bill.

The CHAIRMAN. What is the number of the bill?

Mr. COFFIN. The number given in the letter is the House number, but the House bill is identically the same as Senator Allison's bill. The letter further proceeds:

The provisions of the bill are thoroughly practical, and we hope to see it pass both branches of the National Legislature without any amendment whatever. The Brotherhood of Railroad Trainmen, of which we are the chief officers, embraces a membership of nearly twenty thousand practical railroad men in actual train service, and on their behalf we earnestly request you to do all in your power in favor of this measure.

Sincerely, yours.

S. E. WILKINSON,
Grand Master.
[SEAL.]
W. A. SHEAHAN,
Grand Secretary and Treasurer.

Now, there is the voice of the trainmen, and let me say that probably in the next ten days there will be petitions sent in here not only from these 20,000 men, but probably twice that number of trainmen and brakemen who are outside of the order.

I have a letter from the secretary saying that blank petitions have been sent out to every lodge in this nation, and will be largely signed and sent in here, praying that the provisions of this bill be enacted

into a law. I desire to say, before I read this letter, and also another letter which I have, that not only are the brakemen interested in this matter, but every man on the train is deeply interested in it, and, as my friend, Mr. Brown, knows, many a grand engineer has ridden on to his death because, instead of putting his hand on that triple valve instantly, he had to be calling and calling for brakes, for the boys to come out of the caboose and run over the slippery cars and set them—I say many a grand fireman and engineer has ridden on to his death just because of the lack of these power brakes on these cars.

I hold in my hand a letter from the grand secretary of the Grand Lodge of the Locomotive Firemen of this organization. I do not know as I need to read it all, but I will give a copy of it to the stenographer. He says that he expresses the sentiment of every one of the 18,000 members of the order, asking that this bill—this same bill that I referred to, Senator Allison's bill—be enacted into a law.

The letter is as follows:

GRAND LODGE BROTHERHOOD OF LOCOMOTIVE FIREMEN,
Terre Haute, Ind., May 5, 1890.

DEAR SIR: Absence from the city has belated my answer to your favors of the 25th and 30th ultimo, the contents of which I have carefully noted.

Referring to H. R. 9682, introduced into the House of Representatives by Mr. Henderson, of Iowa, I beg to say, after a careful perusal of its provisions, that I fully indorse the measure and hope it may become a law at the earliest practicable moment, and I have no doubt I voice the sentiments of each and every one of the eighteen thousand members of our organization upon that proposition.

We are profoundly interested in such legislation as proposed by the adoption of safety appliances to protect railway trainmen in the discharge of their hazardous duties, and as the measure in question, if enacted as a law, would be fruitful of incalculable benefits, we heartily favor its adoption, and shall give it all the support in our power.

Yours, very truly,

EUGENE V. DEBS.

Hon. L. S. COFFIN,
Washington, D. C.

Mr. COFFIN. But that is not all. Yesterday the gentlemen, I think, on the Pennsylvania road, paid a very high compliment to the Brotherhood of Locomotive Engineers. I have in my hand a letter signed by Messrs. Arthur, Ingraham, Everett, and Hays, grand officers of that grand order of men, asking for this same thing. If you desire it I will read the letter. It is just the same exactly as those I have read, not authorizing me, as the brakemen did, to act for them in everything, but asking that this bill which they have carefully read and consulted over shall be enacted into law. Not only do they say, We will give it our personal encouragement and efforts," but they further say—

Not only this, but we will venture even to break an established custom adopted here and place our names on the margin of this letter as an indorsement of your efforts in the behalf of employees in the train service. May you succeed in your laudable efforts, and may the Representatives in Congress give, as the true representatives of the labor element of this country, a measure that must prove a relief and benefit to the railway servants as well as the public.

The expressions in this I might read where they say the provisions in that bill—they use about the same language as the brakemen did—are eminently practicable, and must be acceptable not only to railroad managers but to the public at large and the railroad employees.

The letter is as follows:

OFFICE OF THE GRAND INTERNATIONAL BROTHERHOOD OF LOCOMOTIVE ENGINEERS.

Room 5, Blackstone Block, Seneca street, Cleveland, Ohio, May 3, 1890.

MY DEAR SIR: I am in receipt of your esteemed favors of the 25th and 30th ultimo, with H. R. bill 9682 inclosed. Messrs. Arthur, Ingraham, Everett, and I myself, after a careful perusal of the same, desire to say we are heartily in accord with you in this movement and the principles of the bill. We consider it the duty of Congress at this time to adopt by law a measure which will be acceptable to railway managers and employees alike, whereby the lives and limbs of thousands in railway service which are year by year sacrificed may be saved. It is an indisputable fact that Congress has the prerogative, and science has provided a remedy for this growing evil. It would afford us great pleasure to assist you as far as would be acceptable to you in your noble efforts, as we deem them every way worthy of the consideration of all honest persons, yet to do so it would require of *us*, in order to comply, the placing of the whole matter before the representatives at our annual conventions. Nevertheless, I am instructed to say by my associates in office that your noble purpose and the object to be attained is deserving of our personal consideration and support, which we cordially give; not only this, but will venture even to break an established custom adopted here, and place our names on the margin of this letter as an indorsement of your efforts in the behalf of employees in train service. May you succeed in your laudable efforts, and may the Representatives of Congress give, as the true representatives of the laboring element of this country, a measure that must prove a relief and benefit to the railway servants as well as the public.

With best wishes, very truly, yours,

MESSRS. ARTHUR, INGRAHAM, EVERETT, and HAYS.
Grand Officers B. of L. E.

Per H. C. HAYS, *F. G. A. E.*

L. S. COFFIN, Esq., *Washington, D. C.*

Mr. COFFIN. Now, here I stand, Mr. Chairman, in this wonderfully responsible position of voicing the feelings of these three great orders that run the trains. Every man of them is a practical man. Every man of them did more or less of this work, and the petitions that will come in here will be signed by men who are now in the actual work of handling these cars and these trains.

Now, I submit, Mr. Chairman and gentlemen of the committee, that these men know what they want.

Senator WILSON. Before you proceed, I will ask you what response you have to make to the suggestion of Mr. Loughridge in regard to the amendment by which he proposes to eliminate the term "automatic" from the bill.

Mr. COFFIN. I am very glad you called my attention to that, for I may have forgotten it. Of course you will allow me to say that I drew that bill. I spent a good deal of time and thought and had a great deal of consultation with practical men in regard to it. In drawing the bill, where I say "power or automatic brake," my only thought was a power brake operated by the engineer. I had no idea or thought of favoring any one particular patent or anything of that kind, and I am perfectly willing that there shall be eliminated from that bill everything that points to specifying that any one particular thing or patent shall be used, leaving the field open, and leaving the railroad as free as the air to select what their experts shall say is the best. That is one reason, let me say right here, why I antagonize the other bills.

Here is as good a place as any for me to combat what has been advanced by these railroad gentlemen before this committee in favor

of some national commission, supervisory commission, that shall inspect these matters, these things. What do gentlemen mean by such talk? In one breath they tell us what wonderful progress has been made in this nation because you railroad folks are free, have not been trammeled by any legislation whatever in these matters; and then, in the next breath, they ask for a commission that shall hold them and handicap them all from now henceforth.

The CHAIRMAN. I do not understand that anybody has urged the appointment of a commission. There was one gentleman, I think, who suggested possibly that might do some good; one or two may be, but I do not know that anybody has urged it.

Mr. COFFIN. Not such a commission as is contemplated in the bills, but a commission that shall be a sort of supervisory affair and watch over the dangerous character of any of these things.

The CHAIRMAN. There was some suggestion of that kind, but I do not understand that it was insisted upon.

Mr. COFFIN. I should be certainly opposed to anything of that kind.

Now, perhaps, I might strengthen my position a little more. I have here the "Engineering News." I will leave with the stenographer an editorial which I will not stop and detain you to read now. I desire that it shall go into the record. The editorial is by the editor of the "Engineering News" in regard to the bills now before this Congress.

The editorial is as follows:

CONGRESSIONAL ACTION ON FREIGHT CAR BRAKES AND COUPLERS.

Two bills have been introduced in the Senate and are now before the Committee on Interstate Commerce, each of which is intended to secure the very desirable end of hastening the equipment of all freight cars with automatic couplers and power brakes.

The bill introduced by Senator Cullom provides for the appointment by the President of a commission of five persons, three practical railroad men and two men familiar with car construction. The duty of this board is to be:

"To make careful investigation of car couplers in use and of designs for couplers not in use; to fully test all such couplers practically and determine by such investigation and comparison what type or character of car coupler is best adapted for safety and convenience in its use on freight cars."

This commission is to finish this work within one year from the time of its appointment, and is to file a report with the Interstate Commerce Commission, stating what type of coupler is recommended for adoption and what time should be allotted to the railways for putting it in use. Copies of this report are at once to be served on the railway companies, who are to equip all their cars before the time specified, under penalty of $100 per day for every car used without the specified couplers after the date set by the commission. In case the type of coupler chosen is patented, the commission may purchase the patent of the owner, if he will sell for a reasonable sum; otherwise the commission may select another coupler.

After the commission has thus beatifically disposed of the car-coupling question it is to take up other safety appliances, especially power brakes, and make recommendations to Congress as to the device or type best adapted for use.

The bill introduced by Senator Allison provides that after the bill takes effect no company shall put new cars in service, or repair cars requiring one or more new drawbars, without equipping them with "safety automatic couplers or drawbars, such as will not necessitate the going in between the ends of the cars to couple or uncouple them, but which will automatically couple themselves and can be uncoupled from the sides of the cars." After January 1, 1895, it is to be unlawful to use in interstate commerce any car not equipped with such couplers.

Concerning brakes, it is provided that all locomotives shall be equipped with driver brakes before January 1, 1892, and that after January 1, 1893, it shall be unlawful to run any train carrying interstate commerce "that shall not have enough cars in such train equipped with some kind of power or continuous brake, so that the engineer upon the locomotive can control the train, as passenger trains are now controlled by the engineer, without requiring brakemen to go between the ends or on top of the cars to use, as now the common hand brake." The Interstate Commerce Commission is to collect statistics of the progress in the introduction of all the appliances mentioned.

In section 7 of the bill it is provided that, as soon as any railway has equipped its rolling stock with automatic safety appliances conforming to the specification, it may lawfully refuse to accept cars from connecting roads which do not conform to the standards adopted for its own rolling stock.

This is the substance of the two bills now before Congress, and of which it is stated one or the other is very likely to pass. On general principles it can be safely affirmed that it is better for Congress to intrust to a commission the power of investigating and deciding upon technical matters of this sort than to undertake the work itself. Circumstances alter cases, however, and it is quite evident that the Allison bill, which leaves the selection of the proper type of brake and coupler in the hands of the railways, is greatly to be preferred to the other.

Let us see what would be the effect of the Cullom bill providing for the appointment of a commission. In the first place, the present remarkably rapid progress in the application of M. C. B. Std. couplers would be entirely stopped while the commission was engaged in its investigation. No railway manager would venture to take a single step further in the introduction of M. C. B. couplers until it was definitely known just what type or style of coupler the commission would decide on.

Of course, if the President was fortunate enough to secure for the commission thorough mechanical experts, and men competent to take a broad view of the problem, it would be pretty certain what their decision would be; but there are many chances against the appointment of such a commission. It is well understood, of course, that from a hundred to a thousand patentees and owners of patents on various types of automatic couplers would, as soon as the bill became a law, unite and exert all their influence against the appointment of any man already committed in favor of the M. C. B. standard type. The owners of the multitudinous automatic links and automatic hooks not conforming to the M. C. B. type have never been reconciled to the loss of the money they have spent in pushing their various devices, and they would make a herculean effort to one more chance for securing the coveted prize.

But even supposing the commission to be made up of able and impartial men, everyone would await the result of its labors before proceeding further with the introduction of automatic couplers; and what delay would that cause? Remembering that the law makes it obligatory on the commission not only to carefully investigate car couplers in use and designs for couplers not in use, but to "fully test all such practically," it is easy to see that the limit of a year allowed the commission to complete its work would have to be much exceeded. Every inventor will demand that his device be practically tested. The disappointed ones will combine to raise a howl that the commission is partial, unfair, corrupt, incompetent, and has, moreover, been bought up in advance. The newspapers will take up the story and the people will put implicit faith in it.

Reference has often been made in these columns to the need of a Government commission to collect statistics of railway accidents, investigate the more important ones, and make recommendations in accordance with its findings as to the best means of securing safety. In our issue of February 8, 1890, the appointment of a Government commission on uniform railway safety appliances was urged, with ample power to investigate and advise, but no power to compel action. But a commission, such as is contemplated in this bill, with the most absolute powers of dictation, is something without precedent in American legislation, and should be actively opposed by the railways of the country whose interests are at stake. The bill now bears the title "To regulate the use of safety appliances for cars." Some one should move to amend it by striking out the words "to regulate the use of," and substitute therefor the words "to stop progress in the introduction of," on the ground that the title so amended would more accurately express the effect of the bill when a law.

The Allison bill is far preferable to the other in that it leaves the railways unhampered in the choice of the automatic couplers or power brakes which

they will adopt, and in effect only says, "You must not neglect this matter any longer. Adopt whatever you find best, provided it is safe." If the car-coupler question were in the chaotic state it once was, such legislation might do more harm than good; but the question has been thoroughly settled by the railways that the M. C. B. standard coupler is to be the standard for American practice. The Allison bill would have the effect of greatly accelerating the progress in the introduction of this coupler and the application of air brakes.

If Congress is to enact any law on this important matter, and it can not be denied that the humanitarian side of the question presents strong reasons for its action, Senator Allison's bill seems to be a commendable measure. It is true, indeed, that it establishes a new and dangerous precedent for Congress to interfere in technical matters of this sort, and one which may lead to trouble in the future. At the same time there are State laws by the hundred on matters regulating the details of corporate activity. It is universally acknowledged that in this case State legislation is more likely to result in harm than good. The only recourse, therefore, is to Congress, and it can scarcely be doubted that that body has power to act in the case.

Details of the Allison bill doubtless need some amendment, especially the time allotted for the equipment of the cars, which is almost certainly too short. Section 7 of the act enables the railway companies which have already made heavy expenditures in introducing the M. C. B. coupler to exert a strong influence toward similar action on the part of their connecting lines, and is a very commendable feature. More rapid progress in the introduction of the coupler will be especially for the benefit of the railways which have already a large percentage of their cars equipped with it.

Before the close of the present year, if no check is put on the current rate of progress, it is pretty certain that 10 per cent of the freight cars in the country will be equipped with M. C. B. automatic couplers and air brakes. The question of what coupler and brake is to be used on freight cars has been decided by the authorized representatives of the railway companies, and Government interference to open the question anew and take it from the hands of the railways, who are vitally interested in its correct solution, would be a great wrong. The Allison bill, on the other hand, leaves the railways unhampered in their work of reform. It only demands that old fogyism and false economy shall not delay the introduction of these appliances, now that they are decided on.

Many corporations are now actively pushing the reform; but others, it must be said, are paying little heed to it. To promptly secure that safety of the lives and limbs of railway employees which is now feasible, all railway companies should begin at once the equipment of their rolling stock. They must begin sooner or later, and no valid reason for delay can be urged. It is to oblige prompt action on the part of these delinquent corporations, who fail to realize their proper duty to their employees, to the public, and to other railway corporations, that legislative action is called for.

Mr. COFFIN. I hold in my hand a letter received this morning from the editor of the Master Mechanic, which is a railway paper admitted to be of great value in railroad circles. This paper is edited by a man who was with us in all those experimental tests at Burlington, Mr. Crossman. I hope you will allow me to read it, as the letter is very short. He says:

THE RAILWAY MASTER MECHANIC,
95 Adams Express Building, Chicago, May 13, 1890.

MY DEAR MR. COFFIN: Your letter concerning progress of affairs at Washington, together with a copy of the hearing, duly received, for which please accept my thanks. I most sincerely hope you will succeed in carrying through the measures in both Houses, which are based upon your admirable Iowa bill.

* * * * * * *

Very truly, yours,

W. D. CROSSMAN.

L. S. COFFIN, Esq.,
National Hotel, Washington, D. C.

The editor of the Master Mechanic is acknowledged by all to be a very superior man in his position.

The Master Mechanic says editorially:

Legislation on the subject of couplers, brakes, etc., appears to be inevitable. Such legislation, to be effective, should, we most firmly believe, come through the National Legislature; but unless something is done in Congress this session we may expect some of the State legislatures to take action themselves. If all the States that may take such action frame their laws on the lines followed by the act recently passed in Iowa, little harm may be feared from such. We may say here that the act was put through the Iowa legislature through the active work of ex-Railroad Commissioner L. S. Coffin, of that State. As many of our reader's know, Mr. Coffin's hobby is the amelioration of the condition of train men. He has ridden this hobby with all the energy that lies within him, and has very probably made some enemies in so doing, but he has done his work disinterestedly, and in his agitation of the questions relating to car coupling, car braking, and the giving of train men rest on the Sabbath day he has always been consistently in the right. We made brief mention last month of the fact that this law had been passed and gave a short outline of its terms. We now give the law in full, not that we approve of State legislation on this subject, for the readers are well aware that we prefer action from the National Legislature, but because we wish to place before our readers the words of a law which we consider to be very fairly drawn in the interest of both the train men and those who employ them.

Here is the editorial of the Railroad Gazette:

Within less than a month three serious accidents have occurred from failure of the air brakes to control passenger trains. April 17, on the Southern Pacific, a heavy passenger train got away going down a grade of 116 feet per mile. The train broke in two on a curve and the rear cars were derailed. April 28 a passenger train on the Chesapeake and Ohio got beyond control on a 70-foot grade and the rear car was derailed, making a bad wreck, killing one and injuring eight. May 7 a Central of New Jersey train ran into a Lehigh Valley train in Allentown, Pa., killing two and injuring six. It is said "the air brakes failed to work" and the train overran the station. Concerning the last of the three accidents we have no particulars that are reliable. The first, that on the Southern Pacific, is supposed to have been caused by the fault of the engine runner. When a helper was taken on, the runner of the train engine put his valve on lap and shut the cock in the brake valve exhaust from the train pipe. Investigation makes it very probable that when the helper was cut off he did not open this cock. He was a freight runner, and had been in the habit of valve on lap and shut the cock in the brake-valve exhaust from the train pipe. his head when he found that the brakes did not respond to the reductions of pressure. It is said further that the brakes were not tested after the helper was cut off. The engineer had been through two instruction cars and claimed to be familiar with the working of the engineer's valve.

The most obvious lesson from this accident is (aside from all questions of discipline) that the best practice is to put in a cock in the train pipe below the engineer's valve and leave out the cock in the exhaust. This had already been done on many of the engines of the Southern Pacific, but not on the one in this accident. The only information that we have been able to get regarding the cause of the Chesapeake and Ohio accident is that the clevis on the brake beam of the tender broke, the beam fell, some of the brake rigging of the baggage car was torn off, and some part of the broken brake gear hit and closed the cock in the train pipe at the rear end of the baggage car. This explanation is given by an officer of the road who looked into the matter and who certainly is qualified to give an authoritative opinion. Of course accidents of this sort are not unknown, although they are rare. The natural means of preventing them is well known and is now often applied—that is, to put the handle of the cock parallel with the train pipe when the cock is open. In that position it could very rarely happen that anything would strike the handle in such a way as to close the cock. The trouble at Allentown is still unknown. We may conjecture that it was another of those cases to which we have so often called attention in the last two or three years, in which the proportion of the train load available for braking was too small, and in which the slack in the brake gear made it impossible to get the full braking effect. We might mention cases on first-class roads in which the slack on some of the passenger cars is enough to allow the pistons to travel the entire length of the cylinder and bottom on the cylinder head. Perhaps this was one of them. By way of contrast we might

mention a road which regularly handles coal trains carrying 60,000 pounds of coal in 25,000-pound cars on 200-foot grades with but about 24 per cent of the weight braked. This is done successfully by keeping the brake gear in good order.

The Railway Review has the following editorial on the subject:

AIR BRAKES IN "BREAK-IN-TWO" ACCIDENTS.

The Bay View accident has naturally attracted considerable attention to brakes and to train signals. As the train broke apart at a point which left all the twelve-wheeled sleepers in the rear section and the eight-wheeled coaches in the forward portion, some speculation has arisen as to the probable result of such an occurrence when the brakes operate perfectly upon both sections. The rear section, having brakes on only two-thirds of the wheels, could not be stopped as quickly as the forward part, in which all the weight was available for retarding the speed, and the two sections would doubtless close up again with more or less force, depending upon circumstances. In the case of the Lake Shore accident it is doubtful if the crash would have been very serious, though some have claimed that it would. Unless the gap between the two should be very great there would not be sufficient difference in speed at the time of collision to cause a bad wreck.

The conditions on which this problem is based can, however, be found in more exaggerated form in freight service, and though there is not the same danger to human life as when passenger cars are involved, the greater frequency of "break-in-two" accidents and the safety of trainmen should cause the subject to receive careful consideration. When special freight, live-stock, or fruit trains are run over a line at a high rate of speed the trains are generally made up with a number of cars equipped with air brakes placed next to the engine. It often happens that in a train of from twenty-five to forty cars the first eight or twelve will have air brakes. One can readily see that if a break in two should occur at a point which would sever brake connections between the two last cars having air brakes the front section would have nearly all of the brake power. A most serious wreck would be far more probable under these circumstances than in passenger service, for these reasons: First, the weight of the rear section would be very great; secondly, it would not be retarded at all except by the single air-brake car and such hand brakes as might be set in the short time available; third, the gap between the two sections would widen considerably before the brakes got the forward section under control, for the leverages are proportioned to the light weight of the cars, and the live load (unbraked) forming such a large portion of the total weight, would prevent the brakes from quickly overcoming the inertia of that section, especially if the engine was without driver brakes. If the engineer should, under such circumstances, open the throttle wide the result would be more disastrous if the train was on a down grade. It is true that when the gap between the sections was once formed a limited amount of brake power from the front section would be an advantage rather than otherwise, but at the moment of parting great brake power is a great advantage.

As the work of equipping freight cars progresses the conditions outlined above will be more numerous, until a large portion of the entire freight equipment of the country is provided with air brakes. With all cars in a train having power brakes the two sections of a broken train will not then be in a condition to do each other much harm, though unequal loading of cars will even then cause a small difference between the retarding power of the two sections.

I append an extract from the Railroad Gazette of May 2, 1890:

National legislation on automatic brakes and couplers again seems probable. The Flower bill has lately been up before the House Committee on Railroads and Canals. This bill provides that all engines and freight cars in the United States shall be equipped after November 1, 1892, with automatic couplers and automatic air brakes. The bill seems to carry with it the elements of its own defeat. The power of Congress to compel the use of these appliances on engines and cars running within State limits will be questioned, and it would be impossible to equip the stock by November 1, 1892. If the bill means that equipment shall begin after November 1, 1892, it means nothing. Mr. Henderson, of Iowa, has introduced into the House a bill practically identical with that enacted in Iowa this year, and Mr. Allison has introduced the same bill in the

Senate. Mr. Coffin has appeared before the committees in support of this bill. It embodies, of course, the results of the long and careful study that Mr. Coffin has given to the subject, and is as simple and moderate as could be expected. Its provisions apply to rolling stock used in interstate commerce. They are:

"New cars, cars shopped for general repairs, and cars requiring new draw-bars shall be equipped with 'safety automatic couplers.'

"By January 1, 1895, all freight and passenger cars used in interstate commerce or in the construction of any interstate railroad must be equipped with 'safety automatic couplers.'

"By January 1, 1892, all locomotives must be equipped with driver brakes.

"After January 1, 1893, it shall be unlawful to run any train that has not enough cars in it equipped with power or automatic brakes to enable the engineer to control the train.

"Violation of the provisions of this law is made a misdemeanor subject to a fine of not less than $500, and railroad companies are liable in civil damages for any injury to employees, provided there were in use at the time and place the injury was inflicted any car not equipped with automatic couplers and brakes.

"The companies are required to report annually, under oath, the number of cars used in interstate commerce and the number of cars and engines equipped as provided in the act.

"After a railroad company has its rolling stock equipped in accordance with the provisions of the act, it may lawfully refuse to receive from other companies cars that are not so equipped."

Probably it would not be beyond the capacity of the manufacturers to supply the material necessary to comply with this bill, while it would be impossible to furnish that required by the Flower bill. Moreover, the choice of brakes and couplers is left so unrestricted that there can be no complaint of monopoly. The last dispatches indicate that Senator Cullom will introduce a bill to appoint a commission to prepare a draft of a bill. If this is done, the Coffin bill may be defeated in the Senate.

I ask to insert as part of my remarks the letter of E. F. O'Shea, grand secretary and treasurer of the Brotherhood of Railroad Brakemen, addressed to the Interstate Commerce Commission.

The letter is as follows:

LETTER FROM E. F. O'SHEA, GRAND SECRETARY AND TREASURER OF THE BROTHERHOOD OF RAILROAD BRAKEMEN.

[Condensed.]

* * * * * * *

I desire to say by way of explanation that our brotherhood is but five years old and its growth has been very rapid. I have no means of knowing how many brakemen are employed on American railways; therefore I am unable to say just what proportion of them are members of our brotherhood.

Our brotherhood has nearly 15,000 members, consisting of brakemen, conductors, yard masters, and men engaged in various other occupations, all of whom have been brakemen. About one-half of that number, say 7,000, are at present brakemen, and a claim for death or total disability is presented at this office every day in the year.

The whole number of brakemen is surely not less than 70,000; therefore the total number of deaths and totally disabling injuries are not less than 3,650 each year. This does not include pinched fingers, mashed hands, broken limbs, falls, bruises, sprains, etc., from which the sufferer recovers.

The question arises, "Are all of these caused by the old style of brake and couplers?" I answer, "With very few exceptions, yes."

On inclosed notices under head of "cause" you will read various causes assigned, nearly all of which can be traced to the old brake and coupler. Nine-tenths of all "railroad accidents," "railway wrecks," "collisions," etc., mentioned under those headings, could be prevented by the use of automatic brakes and couplers on freight cars, and many cases of death from consumption, typhoid fever, pleuro-pneumonia, and other similar diseases can be traced to exposure and overexertion made necessary by the old-style brake and coupler.

No reliable insurance company wants to take such risks as to insure the lives of freight brakemen, and will not do so without an enormous charge for premium, which the brakemen's meager wages will not allow them to pay. There-

fore our Brotherhood is his only protection. He cheerfully pays all assessments, knowing that when his turn comes, and he always expects it, his loved ones will not be left in absolute want.

There is no longer any excuse for delay in equipping freight cars with these safety appliances, for they have been tested and found to work better than the present style. Their adoption has been recommended by the Master Car Builders' Association, and the only thing now necessary is for the different companies to act together, which they will not do unless compelled by law.

This terrible slaughter of young, able-bodied men is increasing each year; and it has come to be considered a matter of course for a brakeman to have his life crushed out beneath the wheels and his mangled remains strewn along the track. The men themselves can not prevent it; somebody must do the work; and so they make the best of it and take their chances.

If an equal number of passengers were killed and crippled each year the people and press would awaken to a realization of the situation and demand a remedy. Is not the brakeman's life just as dear to him and his loved ones as the life of any other person, and should not an honest effort be made to save him from a death horrible to contemplate? This is especially true when we remember that there is a remedy if it would only be applied.

People say, "If he don't like his job he can quit." True enough, but what is he to do? They can not all quit, and there is nothing else for them to do; besides, their places must be filed, and the slaughter would continue. The newspapers no longer consider the death of a brakeman deserving of more than a two-line item headed, "Only a brakeman," and the reader passes it over and it is forgotten.

Had I the opportunity to do so, I could show you a record of death and mutilation of able-bodied young men that would make your heart sick. You would be horrified and think it all a hideous nightmare, but I can prove that it is as true as gospel. I could continue indefinitely, but it is unnecessary. I submit these facts and figures for your consideration and that of your colleagues in the hope that you will seriously consider the matter. If you do so, I am convinced you will see the need of national legislation, for State legislatures have never yet accomplished anything in this direction, nor will they do so while railroad companies wield so powerful an influence among them.

It is my firm belief that I have greaty underestimated the number of deaths and accidents and I am quite positive I have not overestimated them. If an equal number of horses or cattle were killed each year by the cars a remedy would be applied, and I ask you in the name of humanity and Christianity to take some action in the matter. To continue this horrible slaughter when it can be so easily remedied seems to me nothing less than a crime. The men are powerless to help themselves, the railroads are slow to act, and the butchery continues.

Improvements have been made in every other direction, but not one step in this. To strike is no remedy, to quit is starvation, and to continue is death; not immediately perhaps, but inevitable if he remains long enough in the service. There is an army of cripples in this country caused by the present style of brakes and couplers whose empty sleeves, mangled limbs, stumps, and crutches mutely appeal to your honorable body to remove the cause, and the list is being increased every day.

Mr. COFFIN. I have here also a letter, which I will not stop to read, of the master of motive power, Mr. Rhodes, of the Chicago, Burlington and Quincy road, a friend of Mr. Brown, and an abler mechanic and grander and nobler man, perhaps, is not found in railroad circles. He was the chairman of the committee on experts which had charge of those Burlington tests, and he speaks in high favor of this matter, especially of leaving the roads free to adopt what they, by their experts and master mechanics, prove to be good, especially as regards this matter of couplers.

Mr. BROWN. Inasmuch as that letter has been referred to I would like to have it read and have it appear in the proceedings, and I will be responsible for its appearing, so far as Mr. Rhodes is concerned. Inasmuch as it has been referred to I would like to know what it is.

Mr. COFFIN. I am perfectly willing that it shall go in. I will not take the time to read it, but will hand it to the stenographer.

The letter is as follows:

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY,
OFFICE SUPERINTENDENT MOTIVE POWER,
Aurora, Ill., May 10, 1890.

DEAR SIR: I have yours of the 7th instant, with copy of your hearing before the Committee on Interstate Commerce, which I have read over, and feel much interest in.

I think the position you have taken in defending an adoption of a type rather than a coupler is a very sound one. It has always been a great mistake when any legislation has adopted specific couplers. The force and growth the Master Car Builders' recomendation in the coupling question has attained is owing to the fact that they were far-sighted enough to adopt a type in place of a coupler. If any manufacturers are imprudent enough to construct their couplers of china or glass it should not in any way cast reflection upon the car-builders' standard. No one can dispute the corectness of the type. To be successful, however, it must be constructed properly and made of material that will stand the service it is subjected to. Brakes and couplings go together. One is as essential as the other, but there is this difference. Any automatic coupler can be operated in a fifty-car train without brakes. Air brakes, however, can not be operated in fifty-car trains with any coupler except the M. C. B. type. This is a very important point, and one that seems to have been lost sight of in recent club discussions on the subject.

I have no special references to give on the subject. In the M. C. B.'s annual report for 1886 you will find the executive committee's elaborate report on couplers. Their report for 1887 contains the air brake committee's report. Copies of these you can doubtless see in Washington.

I have not had time to carefully read over the bills, but I know the Iowa bill. Personally, I am not in favor of legislation especially for air brakes. I think it too soon for this, and at the present time it would have the same ill effect as would certainly result if some particular coupler was adopted. We are trying now to get 6,666 cars equipped with air brakes and couplers by the 1st of November. We can not get the air brakes. During the month of April we ought to have had 750 brakes delivered, and in place of this, only received 205. Some of the material is also coming in very poor shape. The more we crowd the manufacturers, the poorer it is apt to come. Poor material often condemns what might otherwise be a good and useful device. If under the present condition of things it is impossible for us to get equipment for 6,000 cars, what would it be if a demand is made, having in view the equipping of a million cars?

I think that there should be at least as much competition in the brake business as there is in the coupling business; it would not be wise or prudent to do much legislating in the matter.

Yours, truly,

G. W. RHODES,
Superintendent Motive Power.

Mr. L. S. COFFIN,
National Hotel, Washington, D. C.

Mr. COFFIN. I have also a letter here from the editor of the Northwestern Railroader, printed at Minneapolis and St. Paul, speaking of this same matter and hoping that this bill that we are talking about will be enacted into law.

I have here also a letter from the editor of the Engineering News to the same effect.

Now, in regard to any legislation at all, I think I need not say before this committee that all railroads oppose any legislation whatever that is to touch them in the management of their affairs. That is always so. We expected something of this kind, that they would oppose even this. But if you should ask the able superintendent of the Chicago, Burlington and Quincy, who has been before you, if he had objection per se to the bill of Senator Allison, or the Iowa law, for himself personally he would say no. But he does not want the

precedent established that Congress or State legislatures shall go to work and specify anything of this kind.

Now, did any of these gentlemen bring any other objection against the passage of this bill? Did they not all admit that trains equipped with power brakes and automatic couplers were safer, so much so that when the Senator asked if they had any data to show the superiority and safety of a train equipped with automatic appliances to a train which was not so equipped, they said there had not been enough data of that kind to give a basis for a report. There is none; and this other thing, admitted by them and by all the public, that it is one of the most seldom things in the world that we hear of a trainman being crushed in that way in handling a passenger train, is because they are equipped with these safety appliances; and all these other dangers that attach themselves to the overhead bridges are to be wiped out the moment that you equip your freight trains as you do your passenger trains.

Senator REAGAN. While you are on this point, these gentlemen insisted that the roads were going on as fast as they could to apply the safety contrivances. What is your information about that?

Mr. COFFIN. My opinion is that such enterprising roads as the Burlington, the Pennsylvania, the New York Central, and some others that I might name, will go on.

The CHAIRMAN. The Erie was mentioned here?

Mr. COFFIN. Yes, sir; the Erie. They will go on. But you and I know enough of human nature to know that there are laggards in railroad management as there are laggards among farmers. There will be roads in this country which for the next ten years, perhaps, will not equip a single car with a safety, automatic appliance unless there is a law which will compel them to do it.

Now legislation has started in this direction. There is no question but the States, like Iowa, will follow it, and why I am so anxious to have national legislation is to secure uniformity in this matter. The railroads themselves, it seems to me, should be here helping me in this respect. It should be a uniform matter, and a national law is the only thing that will reach and accomplish that matter.

I want this point to be impressed on your minds, that if you have diversity in this matter it only adds more danger. The question asked Mr. Brown by Senator Blair—the idea was, is it not more dangerous to couple an automatic coupler with a nonautomatic coupler. I do not fully agree with my friend, Mr. Brown. The boys told me that it is more dangerous because they are not used to it, and in fact some of the opponents of legislation of this kind say it adds to the fatalities. The only reason why it is not more dangerous is because of the boys not being accustomed to coupling a nonautomatic coupler with an automatic coupler; that is all.

Now, again, Mr. Brown says, Mr. Roberts says, Mr. Ely says, and the Erie road folks say "that they shall go on and equip their cars just as fast as they can, law or no law." That is all true, probably, but is it just to these roads, who have to take the cars from all connecting lines, to introduce into their trains these more dangerous cars that lack these safety appliances and have the men run all the risk about it, which will be and must be the case? Now, it seems to me I need detain you but a very short time. Let me repeat that I

stand here with something like seventy-five thousand men in these orders behind me.

The CHAIRMAN. It is alleged here by Mr. Brown and Mr. Roberts, and others, I think, that practically it is impossible for these poor roads to comply with a law such as you propose; what do you say to that?

Mr. COFFIN. With all due respect to Mr. Brown, I do not believe anything about it. These poor roads, of course, have——

The CHAIRMAN. Mr. Roberts said the same thing.

Mr. BROWN. I referred especially to the Northwestern roads.

Mr. COFFIN. These poor roads, as a rule, do not have a great many cars to equip. It costs but little comparatively to equip them. If a palace-car train, for the sake of competition, is necessary to be used on the Central Iowa road, which Mr. Brown spoke of—I do not know whether he did publicly, but to me—which is a very poor road, there is always money enough to secure it. Supposing it is burdensome; is not money cheaper than life?

The CHAIRMAN. Of course it is. It is only a question as to whether they can do it. That is, whether they can get the money. Many of these poor roads are already in debt more than they are worth.

Mr. COFFIN. If they can not do it then let them go to the wall. I would like to inject a sentence right there, that I wish this had been acted upon years ago. There should be lodged somewhere power that shall say when a road shall be built and when a road shall not be built.

The CHAIRMAN. That has gone on practically.

Mr. COFFIN. You can stop it now from going on any further.

The CHAIRMAN. You can not do that, because these roads are built under State charters and State officials and afterwards become interstate roads by virtue of consolidation.

Senator WILSON. That is a safety appliance that belongs to another field.

Mr. COFFIN. Can there be any hesitancy, no matter what the plea of poverty is, in your saying that from now on the business of having freight cars built four-fifths of iron and wood and the other fifth of the blood of the trainmen shall be stopped? That is virtually the practice now. Can there be any plea of poverty that can prevent you from taking such a course? Let the railroads finish their cars before they put them into use, and even if they are not able to, if they run in debt, let them charge the public more for the use of them. That is a point that it seems to me we can not get around.

Now, when the consensus of opinion of the very men, the thousands, who say that this bill is the practical thing and what they want, that it will save the lives of these men, what excuse have we for not having it enacted into law?

Senator REAGAN. If we had any way to squeeze the watered stock out of these roads there would not be much trouble in equipping them?

Mr. COFFIN. I do not think we will have much trouble. If you say so they will do it; but if you do not say so it will not go on but only a few of these roads. Now, I know that gentlemen like Mr. Roberts, men of brains and standing, can come before you here and

have great influence; but I do say that the practical men who do this work on these trains ought to have just as much influence.

The CHAIRMAN. It is not an influence of individuals on this committee. It is a question as to what our duty is.

Mr. COFFIN. The influence of the testimony given.

The CHAIRMAN. Of course whatever a man says, if it is true, must be considered.

Mr. COFFIN. Yes; but are not these train men qualified to speak practically?

The CHAIRMAN. Most assuredly so.

Mr. COFFIN. It is the voice, without a single exception, of every one. As Mr. Brown himself says, they are in favor of these appliances, and I can not see why as the representatives of these men they should not have this, the first thing they have ever asked for.

Senator BLAIR. How many freight cars do you say there are in this country?

Mr. COFFIN. About a million freight cars, and about one-tenth of them are already equipped with power brakes and automatic couplers.

Senator BARBOUR. I do not wish to divert you from the line of your remarks, as you may already have spoken upon the point. Is it not a fact that the railroad companies of the country as a general rule are adopting these various devices to improve the safety and management of trains?

Mr. COFFIN. They are to some extent; but probably not one company in ten is doing it.

Senator BARBOUR. You mean not one in ten is making any effort whatever in that direction?

Mr. COFFIN. I think I may say, so far as the automatic brakes and couplers are concerned, that there are a great many roads that are not doing it at all.

Senator BARBOUR. Is that 10 per cent of the freight cars that have adopted these improvements confined to a very small number of companies?

Mr. COFFIN. Yes, sir.

The CHAIRMAN. The larger trunk lines?

Mr. COFFIN. Yes, sir.

The CHAIRMAN. The sum and substance of it is that these gentlemen who have been before us yesterday and this morning, at least Mr. Brown, this morning again, expressed the belief that any legislation on the part of Congress was unnecessary, and would not aid in the progress of the application of these new appliances as to time.

Senator BARBOUR. And would possibly retard them.

The CHAIRMAN. You take the opposite view?

Mr. COFFIN. Yes, sir.

Senator BLAIR. What effect has the legislation in Iowa had in that regard?

Mr. COFFIN. It has just passed, and it is stimulating, as Mr. Brown says, the companies very much to put on these improvements as fast as they can.

Senator BLAIR. In that State?

Mr. COFFIN. Yes, sir; the companies that belong in that State. His company is considered.

Senator BLAIR. When did the law pass?

Mr. COFFIN. This winter.

Mr. BROWN. I want to correct Mr. Coffin. I did not refer to the Iowa law at all. In fact, it has had no effect on our road, except to cause some discussion as to whether or not something of that kind might not be undertaken by the National Congress. Our order for automatic brakes and couplers was placed before that law was even agitated.

Mr. COFFIN. The ground I had for saying what I did was this: I corresponded with some of the different manufacturing establishments who were manufacturing couplers and brakes, and they told me their increase in orders had been very great within the last month or two. One company of couplers that last year put out some 35,000, the four months of this year they have put out, or have had orders for, 29,000 already, a wonderful increase.

If I recollect rightly, I think I have stated that the main objection to the passage of this bill on the part of the companies is not to the provisions of the bill. It will not hurt them, they say, but they do not want you to establish that precedent. That is all I think there is about that, if I recollect aright.

The CHAIRMAN. They take the ground that no legislation is necessary. There is no great amount of discussion of the particular bill you refer to. Take Mr. Roberts, for instance; I do not think he discussed the bills very much at length. According to his view there was no necessity for such legislation.

Mr. COFFIN. There is one thought more that I think should have bearing, and quite a bearing—there are two—in the future. One is in regard to the overhead crossings. The time is coming when in all thickly settled communities and States you will have a law forbidding all grade crossings; it should be done. The railway commission of Massachusetts makes a very strong point in favor of automatic brakes on cars. It will lessen the expense to the railroads wonderfully in making these overhead crossings for the public in many ways: First. The actual expense in building them, so much less expense in not having them so high. Another expense is that the abutting property is greatly injured by these raised ways, and they have to pay very high for it, which, if you have no necessity for anybody being on top of the cars would be very much less. Another thing is the great traveling public has a great interest in this matter, and if there was not anything else, this law should be passed in the interest of the public.

Why, sir, if I could picture before this committee just one thing which took place on Mr. Brown's road last 4th of July, it would settle this question perfectly as it has settled it for that road. A great freight train of 29 cars, with a double header, was, on the 4th of July, leaving a station. A passenger train was over here [indicating] at this next station, full of people, so full that women, children, and men were standing in the aisles and out on the platform. By some mistake of the dispatcher those two trains were sent out and the freight train ordered to go to that other station where the passenger train was supposed to be as fast as steam could make its wheels turn. Mr. Brown was sitting in his office when the dispatcher ran in and told him he had sent those two trains together. Mr. Brown was thunderstruck for a moment; then, rising up with the energy of a railway

official, he had the wrecking train and the physicians and the nurses on the way to that scene of supposed disaster before the trains came together; and had they come together, as he expected they would come together, there would have been a recital of the worst calamity in railroad circles we have ever had.

What was the fact? Nineteen of those freight cars were equipped with the power brake, and as those trains, coming round a point, saw each other, only about 1,000 or 1,200 feet apart, instantly every car of those 19 had the brake applied, and one of the most fearful calamities was averted. It converted the Chicago, Burlington and Quincy road to use a power brake on every train. You and I can be riding in those passenger trains and we are liable to be run into any time, because the engineer can not apply the brakes at the moment of danger. I think I am correct, Mr. Brown, in describing the main points of this occurence?

You will see collision after collision, and why? It is because they have not the power to control the train. As I said in my statement here the other day, in my investigations of collisions and wrecks in Iowa, in my honest judgment 50 per cent of them could have been prevented if the engineer could have had control of the brakes.

I say that everything that should have any weight at all is in favor of the passage of just such a bill, perfected so that it shall be all right so far as its legal phrases are concerned, and no railroad in the country can be injured by it. Mr. Harris, the manager of Mr. Brown's road, in speaking of the power brakes, says that after his experience with power brakes on his road no railroad can afford to run freight trains without the power brakes. It is a matter of economy to the roads. Of that I am satisfied. And shall we, just for fear of establishing a precedent, keep these dangers open and before the public and cut down these men by the score every day, when no injury, when no hurt can come to my friend's road or any other road by the passage of this bill?

I thank you, Mr. Chairman and gentlemen of the committee, for your patience and attention.

At 12 o'clock m. the committee adjourned until to-morrow at 1 o'clock p. m.

WASHINGTON, D. C., *May 16, 1890.*

The committee met at 1 o'clock p. m. pursuant to adjournment.

The CHAIRMAN. We will hear Mr. Cook now.

STATEMENT OF B. C. COOK.

Mr. COOK. I represent the Chicago and Northwestern Railway Company. I have been one of the executive committee of the Western Railway Association, which comprises about half of the railways in the United States.

A few years ago the question was mooted by the railways belonging to that association as to what could be done to secure a better plan of coupler and also in relation to a power brake. The committee of which I was a member investigated the matter as carefully as it could and found that it was impracticable for us—and we believed for any class of men not practical mechanics—to arrive at a satisfactory solu-

tion of the question. We thereupon recommended to the roads belonging to the association that the matter should be referred to the master car builders, and that they should conduct such series of experiments as might be necessary to thoroughly test the question. That, I believe, was the origin of the association known as the Master Car Builders' Association. This representation was made to the roads, and is the action of the roads themselves and not the car builders of their own motion.

The CHAIRMAN. When you say "the roads," do you mean all the roads or certain roads?

Mr. COOK. I mean the action which has been taken is the action of the roads represented in that association.

The CHAIRMAN. What were they?

Mr. COOK. I can not give the names of the individual roads; about one-half of the railroads in the United States, comprising generally the great trunk lines of the North and many of the trunk lines of the South.

This series of experiments adopted by the Master Car Builders' Association has resulted in the adoption, in June, 1888, by that association of a system and plan composed substantially of the Janney coupler and the patent for contour lines of couplers. By constructing the coupler in accordance with the plan of the patent for contour lines this result is obtained, that the coupler may be used in connection with any other automatic coupler constructed with the same contour lines, those contour lines, when any automatic car coupler is constructed in accordance with the contour lines, will couple with any other automatic coupler having the same contour lines.

Senator BLAIR. What do you mean by contour lines?

Mr. COOK. I will submit an explanation of that.

Senator BLAIR. So that they fit with each other?

Mr. COOK. Yes, sir.

The CHAIRMAN. The devices of the Master Car Builders' Association go together?

Mr. COOK. Yes, sir. Now, there are about four thousand patented devices for car couplers. There are 230 patented devices for automatic car couplers. Twelve of these are main fundamental devices, and what I wish to say is that by adding this device of contour lines they may all be operated together as automatic couplers.

Senator BLAIR. The two hundred and thirty.

Mr. COOK. Any which have these contour lines, yes, sir; the device which was agreed upon by the master car builders after many months of experiments, and experiments conducted at great expense.

The CHAIRMAN. By the railroads?

Mr. COOK. By the railroads. The device embraced the idea that they should have couplers which would connect together, whichever one of these automatic couplers was adopted.

I wanted to speak of that just as a matter of history. That automatic car couplers were adopted by a very large number of roads. I can not give the exact number. But the Northwestern, the road which I represent, adopted it, and has altered 2,800 cars on that plan.

The CHAIRMAN. Putting these appliances to them?

Mr. COOK. Yes, sir; and it has resulted in this, that cars may be coupled and uncoupled without the men going between the cars in any manner.

I understand that the reason for legislation on this subject is to be found in the fact, if fact it be, that these couplers required are less dangerous and safer.

The CHAIRMAN. Statistics have been produced showing great injury to limb and property by the old coupler.

Mr. COOK. This master car builders' plan has proved, so far as the danger is concerned, absolutely, that the cars may be coupled and uncoupled without going between the cars. Now I represent a road which does not want to be understood as resisting in any way any plan practicable to secure the adoption both of the power brake and of the automatic coupler. What I want to talk about is, which is the best way to do it. We are satisfied that the best way to do it is to take this master car builders' plan; that no commission or any other body of men can possibly be instituted which can have the facilities and the requisite technical knowledge to place them on a par with the Master Car Builders' Association; and the expense which they have been through in making the experiments is something very large and such as the Government would not go to in making experiments.

Now, the only question is, what course is best to pursue to attain the end sought, and we do not want to antagonize that end in any way. If a commission were to be appointed, I suggest that the change which is now going on so very largely—I am going to speak about that in a minute—from the old link and pin to this Janney automatic coupler, with the improvement of which I have spoken, would be stopped. It would be impossible, say for the Northwestern road, to go on making changes at the expense they are now doing and at the same time running the risk of having to adopt another plan and throwing away all they have done.

The CHAIRMAN. I think Senator Blair will bear me out, probably, in saying that the investigation so far has pretty much exploded, I think, any idea that any Government commission is necessary to be appointed. Is not that so, Senator Blair, in your mind?

Senator BLAIR. I think so, or that there is probability of the adoption of any very fixed and well-prescribed limitation upon experiment, honest and anxious experiment, for improvement hereafter. I should judge from the testimony before the committee that there was not any probability that they would bind these gentlemen to any particular suggestion of appliances.

The CHAIRMAN. I think the only question, really, which is left for us is to determine whether any action by Congress is best or not.

Mr. COOK. I will discuss that question for two or three minutes, just by a statement of facts.

The number of cars in the United States which would have to be remodeled is stated in Poore's Manual for 1888 to be a million and over, a million and five thousand. The cost of doing it is a matter settled and determined by our road. We have ascertained that the minimum cost of putting on this master car builders' automatic coupler, with this contour-lines attachment is $25, and that to put on the power brake is $70.

The CHAIRMAN. Making the total $95?

Mr. COOK. Yes, sir.

The CHAIRMAN. For both ends of the car?

Mr. COOK. Yes, sir.

Senator BLAIR. Seventy dollars for the brake and $25 for the coupler?

Mr. COOK. Yes, sir.

Senator BLAIR. The probability is that there are many roads which can not do that with the economies a great corporation can. Probably $100 a car is a fair estimate.

Mr. COOK. Yes, sir.

Senator BLAIR. And a million cars to be changed would be $100,000,000.

Mr. COOK. Yes, sir. I am just giving you the results of the experiments on the Northwestern.

In the first place, I should say that the power brake stands on a different footing from the coupler, because the power brake has been demonstrated to be a success. It is settled that they have found a power brake which can be applied successfully. Up to a very short time the question of an automatic coupler was so doubtful and dubious that it was almost impossible to settle upon any.

When this master car builders' automatic coupler was agreed upon, the Northwestern road commenced immediately to make the change. They have put the automatic coupler on 2,800 cars. On what proportion of the cars have they power brakes, Mr. Schroyer?

Mr. SCHROYER. On an equal number. The power brake is on 2,800 and the automatic coupler is on 2,300.

Mr. COOK. They are progressing just as rapidly as possible to make the change on the entire road. The gentlemen of the committee will see that, having begun to make the change, it is absolutely necessary to complete it and carry it through.

The CHAIRMAN. As quickly as you can?

Mr. COOK. Yes, sir.

The CHAIRMAN. What actual progress are you making now?

Mr. COOK. We are equipping several hundred cars per month. I suppose, myself, about 400 cars per month.

Senator BLAIR. How many freight cars have you?

Mr. COOK. About 40,000.

Senator BLAIR. It would take you eight years then?

Mr. COOK. The extent to which it can be carried is only limited by time and money.

Senator BLAIR. What is the increase in the number of your cars?

Mr. COOK. About 4,000 annually.

Senator BLAIR. Those 4,000 cars are all equipped in the new way?

Mr. COOK. Yes, sir.

Senator BLAIR. How long will it be before they are worn out?

Mr. COOK. I am going to speak about that in another connection.

Now, there are three things to be taken into account by practical men devising a practical scheme. The change must be effected, not by beginning with the old and worn-out cars, which need repairing most, as one of these bills speaks of, that any car coming from the repair shop shall be equipped with these new appliances. There are a great many cars too valuable to throw away which are not valuable enough to have these improvements put upon them, to the exclusion of other cars which are newer and stronger and will have a longer life. If we begin with the poorest cars we would be working on the poorest cars all the time. The fact is, that the expense is greatly

reduced by putting these improvements upon strong cars which are going to last. That is manifest.

The second question is: How fast is it possible to procure the material and labor? You can not put on these automatic brakes by statute. The amount of skilled labor applicable to that change is very limited. The material is in great demand now. The fact is, that beyond the supply of material and skilled labor, it is impossible for the roads to go if they were to be hung.

The CHAIRMAN. The officers?

Mr. COOK. That is a physical impossibility; and I state my conviction and belief, and I think our master mechanic will bear me out in saying that the road is using every endeavor in its power, with the amount of material and labor that can be procured.

Mr. SCHROYER. Yes, sir.

Mr. COOK. And unless you could by statute increase the amount of material and labor we could get, you can not make us go any faster.

Then the next question that I suggest, first, the cost; second, the amount of material and labor applicable to it; third, how large a percentage of the equipment of a road may be withdrawn from actual use for this purpose without impairing the service.

Suppose we have 400 cars out a month. It can not be increased without impairing the equipment of the road for actual service, and injuring not only the road but the public. I suggest these things because they are practical difficulties which have to be met by the railroads and there is no escaping them. The railroad managers, the mechanics, and the master car builders can not get around them. Mr. Schroyer knows more about that than I do, but I know enough about it to know that there are bars and limitations put up against going on with the improvements any more rapidly.

The CHAIRMAN. The Master Car Builders' Association urge the passage of some law.

Mr. COOK. I do not know about that.

The CHAIRMAN. I think Mr. Coffin presented a communication on that subject to the committee, which goes into the testimony.

Mr. COOK. I want to make a suggestion. There is no doubt that the main roads engaged in interstate commerce are adopting, with all the speed that is practicable, this master car builders' coupler and this improved brake.

Senator BLAIR. Which do you think the more important with a view to safety—the air brake or the automatic coupler?

Mr. COOK. I should think the brake would be more important than the coupler. That would be my notion. I am not a mechanic and I do not know.

The CHAIRMAN. So that the conclusion necessarily drawn, as I suppose, from your testimony so far, is that any legislation would be useless?

Mr. COOK. Yes, sir.

Senator BLAIR. So far as your road is concerned, did you consider this other question, which I think is the only one in the minds of the committee, whether legislation would be an advantage in securing action upon the part of those roads which otherwise would be dilatory?

Mr. COOK. I want to speak about that. I have not spoken about it.

There are certain laws of trade which are more imperative than statute laws; stronger laws. Suppose these roads which I have referred to adopt this plan of coupler and of brakes. The other roads have either got to come into that scheme or they have got to abandon the interstate traffic and be restricted to their own lines of road.

Our road, when it gets these improvements on its cars, is not going to receive cars equipped with the old link-and-pin coupler and the mere brake which is operated from the top of the cars.

The CHAIRMAN. Twisted around?

Mr. COOK. Twisted around.

It is an axiom in railroad matters that a car is only earning money when its wheels are turning. Here is a road which has its cars loaded with freight to go way off into another State. That is the ordinary, common mode of business of the railroads. You look at a train of cars and read the names on the cars and you will find they are billed to a dozen different roads.

The CHAIRMAN. And going to a dozen different States?

Mr. COOK. And going to a dozen different States.

Senator BLAIR. Oftentimes 3,000 miles from home.

Mr. COOK. What I say is that all the roads will be compelled by the action of the main trunk lines to go into the matter. They will be compelled with a force to which the force of a statute is nothing.

The CHAIRMAN. To avoid going out of business?

Mr. COOK. Yes, sir; they lose the money; they lose the use of their cars; they are shut out of traffic.

Senator BLAIR. In what way can a statute, which does not discourage improvements, which does not fetter a road like yours, which is doing the best it can, which does not interfere with the Master Car Builders' Association recommendation, retard or interfere in any way? It simply requires certain things to be accomplished. In what way can that retard anything?

Mr. COOK. If it requires the improvements to be made within a proper time I have no objection to it.

Senator BLAIR. What is that proper time, in your judgment?

Mr. COOK. I have just given you the data.

Senator BLAIR. So far as your road is concerned, have you any judgment as to the country at large?

Mr. COOK. I think our road has facilities for doing as well as anybody and as fast as anybody.

Senator BLAIR. Do you think if it were required to be done in five years that that would be burdensome to the transportation interests of the country?

Mr. COOK. Well, sir, I do not believe it can be accomplished in five years.

Senator BLAIR. If you prescribe a very great period of time it will look to them as though they had plenty of time and would result in delaying matters. It would tend to procrastination instead of haste.

Mr. COOK. The question was argued before the Iowa legislature recently. Our general manager, Mr. Whitman, was there. They had adopted the year 1893. After hearing the evidence in relation to the time they put the time five years from the 1st day of next July.

Senator BLAIR. Making it 1895?

Mr. COOK. Yes, sir; the 1st day of July, 1895.

The CHAIRMAN. That is for Iowa?

Mr. COOK. Yes, sir; it is for their State.

Senator BLAIR. Do you see any reason why any other State should adopt a longer time than Iowa?

Mr. COOK. No, sir. I think I see a reason why Iowa should have adopted longer time. I do not believe it can be done in that time. That is a question which you can judge of. Our company is in earnest and would have made a good effort to accomplish it in that time, law or no law.

Senator BLAIR. If there was any general expression, even of the national will, that would cover interstate commerce and really all commerce, then those who furnish the appliances and the men who do this work would be assured of five years' business, and they could make their investments, get their plants, turn their attention that way, knowing that they would have the work to do. As it is now, they do not know whether this, that, or the other road will do anything about it. They are shy and chary of making the necessary investments in material and plant, perhaps, to supply the cars of the country. They have to wait orders, in other words. Now, here is a statute which is an order; it is an order for all this hundred millions' worth of couplers and brakes; it is an order on the country to furnish that amount, and the railroads have got to go in and do the subsidiary business of distributing it around. The nation has ordered the constructive power of the country to furnish a hundred million dollars' worth of couplers and air brakes, power brakes, within five years. They can not pitch in and get all ready, because they know that this, that, and the other road will come in with the minutiæ which make up the aggregate. As it is now, there is no certainty at all that a quarter of the roads will come in at all. The important roads are doing it, your road is doing it, the roads whose representatives come here are doing it, but the great mass of the roads are not indicating any desire or active effort on their part.

The CHAIRMAN. The reason they come here is because they were invited to come. They were notified that we would like to hear them, if they had anything to say.

Senator BLAIR. Those who come here representing the loss of life and limb are anxious to put a stop to it. They insist upon immediate action. Mr. Coffin and others, these train men, want relief; and one of these big roads has already got the name of "man-killer."

Mr. COOK. I want to be understood as not antagonizing, in behalf of the Northwestern road, this scheme of having automatic couplers and power brakes. They are not going to do it; they are going to adopt them with the utmost speed, but I want to say at the same time that it is impossible for a statute to overcome physical difficulties. There is no way.

The CHAIRMAN. On the question of time?

Mr. COOK. Yes, sir; on the question of time. Now the question of money. That is a very important question. The railroads have got to find the money. The Northwestern road, with its 40,000 cars, has got to find $3,800,000 in money. Then it has got to find material and labor, labor which is specially skilled, which they have got to have.

The CHAIRMAN. Where are these appliances now manufactured?

Mr. SCHROYER. At Pittsburg, principally.

The CHAIRMAN. Are they not manufactured by more than one or two firms in the country?

Mr. SCHROYER. Yes, sir. The air brake is manufactured by one firm exclusively, as yet. The automatic couplers are manufactured at Pittsburg, Cleveland, Chicago, and to some limited extent at Milwaukee.

Senator BLAIR. Are they all patented?

Mr. SCHROYER. Yes, sir.

Senator BLAIR. As you increase the demand is there a tendency to increase the cost?

Mr. SCHROYER. Not as yet. As the demand is increased the quality of the product is getting poorer——

Senator BLAIR. One other gentleman spoke of that.

Mr. SCHROYER. As a result of haste in getting out material.

Senator BLAIR. That is a very serious question.

Mr. COOK. I want to reply to a suggestion of Senator Blair, which has passed my mind just now.

Senator BLAIR. I asked Mr. Schroyer if this increase in the demand would have a tendency, or did have a tendency, to increase the price charged. I asked him, also, if the work was done in accordance with certain patent rights.

Mr. COOK. Now, the patent which is the basis of the Master Car Builders' scheme is the Janney patent, which has expired, and which is now the property of the public.

The CHAIRMAN. I am glad to know that.

Mr. COOK. The patent for the contour lines, which is necessary to make these different plans work together, is an active, live patent now.

Senator BLAIR. How much longer has it to live? Is it owned by the same party as the Janney couplers?

Mr. COOK. I believe so.

Senator BLAIR. Is that improvement on the Janney coupler patented?

Mr. SCHROYER. The contour lines were the Janney patent originally. They have waived their claim on the contour lines in favor of the Master Car Builders' Association.

Senator BLAIR. Then there is no patent now?

Mr. SCHROYER. Not on the lines themselves. The patent is on the peculiar construction.

Mr. COOK. There are patents on various automatic couplers, but not upon this coupler which is recommended by the Master Car Builders' Association. There is no patent so far as the roads represented in the Master Car Builders' Association are concerned.

The CHAIRMAN. So far as the roads represented in that are concerned?

Mr. COOK. Yes, sir.

The CHAIRMAN. But they are not all represented?

Mr. COOK. No, sir. Now, these contour lines have a patent on them. It is a patent to Janney, of February 25, 1879. That patent covers what is known as the contour lines of the rotary hook and drawhead. The owners of the patent have voluntarily agreed to grant licenses under the same to all railroads who are members of either the Eastern or Western Railroad Association, free of charge.

These are the associations I suggested to you, which got up these tests.

The CHAIRMAN. And really were the originators of the Master Car Builders' Association.

Mr. COOK. Yes, sir. There are about two hundred and twenty live patents for vertical-hook couplers now. But this Master Car Builders' plan has escaped the patentees. They can not be bothered by patentees. The only question is the question of time and money. I conceive that many roads must be seriously embarrassed by a demand made upon them to advance the sum of money necessary to put these improvements on their cars. It is a matter of very great anxiety to our road. They have made an appropriation of $10,000 a month for the coupler. That is being used now.

The CHAIRMAN. One hundred and twenty thousand dollars a year?

Mr. COOK. Yes, sir.

Senator BLAIR. Do you not think that there will be a corresponding saving, so that after a year or so it will be found to be no tax upon the road?

Mr. COOK. I can not see where the saving will come. Of course I do not speak from personal knowledge, but I suppose it will take just as many men to run a train of cars equipped with these improved appliances as a train of cars equipped in the old manner.

The CHAIRMAN. That is the testimony of experts.

Senator BLAIR. There is a saving in the way of collision and danger to life and limb and property, and in that direction?

Mr. COOK. I think that depends upon other things.

Senator BLAIR. You do not think they contribute to economy?

Mr. COOK. They may contribute to the safety of life.

Senator BLAIR. Is there not a saving of money from the introduction of the power brake and the automatic coupler?

Mr. COOK. I am not competent to answer that question, sir. I am not a practical mechanic.

Senator BLAIR. I had reference to the general running of the road.

The CHAIRMAN. In the way of damages for loss of life, and property, and limb, etc.

Senator BLAIR. And the smashing of trains, and all that.

Mr. COOK. For fifteen years I was general counsel of the Northwestern road. My experience in these matters is that the amount of damages for personal injuries depends upon so many other contingencies that no exact estimate could be formed as to what might be saved by changing the brakes and couplers.

The CHAIRMAN. There is a little security against the wrecking of trains by having these appliances?

Mr. COOK. Yes, sir. Our folks think that they can avoid danger to life and property, of course; else they would not have helped, as they did, to initiate and carry forward this movement. In relation to the money, you have got my idea about that. In relation to the amount of material and labor which can be got, under any contingency, by any pressure, and in relation to the amount of equipment which can be withdrawn for the purpose of having these repairs made at any given time, those are matters which I think should be carefully considered, because they are matters of very grave importance.

Senator BLAIR. How would a suggestion of this kind do: Each

road should equip at least one-fifth of its rolling stock annually—some provision of that kind. One-fifth or one-sixth of its rolling stock annually should be equipped with these appliances? Fix a fractional proportion.

Mr. COOK. I think, if the proportion were fixed properly, that that would be all right. I do not object. I want to be understood as not objecting to requiring every new car to come on to the road with these improvements. I do not object to that.

Senator BLAIR. That would cover the increase?

The CHAIRMAN. I suppose you do not have any new cars which have not these improvements on?

Mr. COOK. No, sir. It would not make any difference to us whether there was such a law or not.

The CHAIRMAN. I should think all the roads would do that, unless they have begun to buy your old cars as the best they can do.

Mr. COOK. But, gentlemen, I beg you, do not provide without due consideration for making these changes on cars which are now in use. That is substantially asking us to put the improvements on the old cars to the exclusion of others. I think it is true that there is constant improvement even in this Master Car Builders' coupler. The improvement mainly consists in the better manner of annealing the material, so as to provide against breakages, and if we were to get any cast-iron thing, gotten up by a commission, that would be the end.

Senator BLAIR. Have you any suggestion to make as to what could be done by the committee or by Congress to meet this demand that something be done, for there is a very strong pressure of that kind?

The CHAIRMAN. Mr. Coffin states that there will be petitions with 30,000 or 40,000 signers, I believe, here in a very short time in favor of legislation on this subject, the employees of roads and the members of these different associations.

Senator BLAIR. Now, what can we do that at least will not be injurious?

Mr. COOK. I do not see how you can help anything by legislation, under the state of circumstances that now exists.

Senator BLAIR. Assuming that we have got to do something, what can we do, from your standpoint, that will be the least hurtful?

Mr. COOK. I should think that the proposition to require new cars to be equipped with these improvements would not be objectionable. It would not hurt anybody who is really, in good faith, endeavoring to carry out the result.

Senator BLAIR. And that could apply everywhere.

Mr. COOK. Yes, sir.

Senator BLAIR. There is no part of the country where cars are made at all where they could not get the necessary facilities.

Mr. COOK. It is not like withdrawing their present equipment. It is having the new cars take a few days' more time to complete.

Senator BLAIR. How would this do, that no road should add any car to its existing equipment without putting on these appliances, so that they should not go and buy your old cars: whenever a road puts on another car, adds another car to its ownership, or any transportation line or freight line association increases its ownership of cars, that they shall apply the power brake and the automatic coupler?

Mr. COOK. We have not got the cars to sell, and I do not believe anybody has, but there would be no oojecton to your suggestion.

The CHAIRMAN. I should think that was about as moderate a plan as could be adopted, if we do anything.

Senator BLAIR. That no new car shall be made without these appliances, and that no road shall add to its equipment of cars by purchase of second-hand cars, or otherwise, without applying these improvements. There will be a great tendency, as the more powerful roads proceed with this process of transformation of their rolling stock, to get rid of their cheaper and more worn-out cars.

The CHAIRMAN. By selling them to other roads?

Senator BLAIR. Now, as a practical man, do you think there would be any objection to a provision of that kind?

Mr. COOK. I do not think so.

STATEMENT OF CHARLES A. SCHROYER.

Senator BLAIR. How many passenger cars has the Northwestern road equipped with these appliances?

Mr. SCHROYER. About seven hundred passenger cars.

The CHAIRMAN. How many freight cars has it?

Mr. SCHROYER. Forty thousand. The point that I would like to talk about is the mechanical department only. If we were compelled to equip 25 per cent of our cars, or 20 per cent of our cars, each year it would compel us to equip 20 per cent of forty thousand cars, eight thousand cars, the first year. It would be a burden that we could not perform, a burden we could not do in our department.

Mr. COOK. Just explain the reasons, on account of the lack of material or labor.

Mr. SCHROYER. On account of the lack of material and skilled labor.

The CHAIRMAN. And money?

Mr. SCHROYER. Money first, as it would cost from $90 to $100 per car to make these changes. Eight thousand cars at a hundred dollars is $800,000 the first year.

The CHAIRMAN. Practically putting nearly $1,000,000 into the business in one year?

Mr. SCHROYER. Yes, sir.

The CHAIRMAN. Suppose there was a law passed requiring that this transformation should all take place within six years, do you think the demand would be such and the certainty that the work had to be done would be such that it would result in the construction of shops and machinery and proper arrangements for the manufacture of these things as fast as they would be required?

Mr. SCHROYER. If it were compulsory there certainly would.

The CHAIRMAN. The material and the skilled labor can be found somewhere?

Mr. SCHROYER. Yes, sir; in six years.

The CHAIRMAN. In time to complete the work in that period?

Mr. SCHROYER. We would condemn from our service probably 8 per cent a year of the present equipment, those being of the older cars. If the first year after the enactment of a law of that kind we equipped 10 per cent of the remainder, we would have 18 per cent of those cars disposed of, 8 by condemnation and 10 by equipment. If in the second year we equipped a certain number we could probably

accomplish the same results, but I do not see that we could equip our cars in less than eight years. I do not see how we could do it.

The CHAIRMAN. And you can do it as rapidly as any other road, perhaps, being a large road and all that?

Mr. SCHROYER. Yes, sir; I expect we could.

The CHAIRMAN. The Pennsylvania has about 100,000 cars, and about 10 per cent of its freight cars are now equipped, and the testimony of Mr. Roberts was that he was very much against any legislation, thought it impracticable and unnecessary, as the main lines were doing everything in their power already, but said, as Mr. Cook has, that his road was going right on as fast as they could without reference to legislation.

Mr. SCHROYER. That is what we are doing. Since the adoption of the Master Car Builders' type of bar we have gone along putting that bar into service and equipping the cars with the automatic air brake.

The CHAIRMAN. The testimony of Mr. Brown, of the Chicago, Burlington and Quincy, was that they have an order out now for six Burlington and Quincy, was that they have an order out now for 6,666 cars with these improved appliances.

Mr. COOK. Did he say how long it would take them to have the order filled?

The CHAIRMAN. No, sir; I do not think I asked him that question. He said the couplers were way behind. I gathered from his statement, I think, that within a year they had set aside $400,000 for the equipment of the cars, and that that sum would just equip 6,666 cars.

Mr. SCHROYER. In legislation of this kind all classes of cars are included. Now we are having some new flat cars built, and when the general manager asked my opinion as to the advisability of having the air brake put on the flat cars I advised him not to do it, for the reason that the present practice is to put all cars equipped with the air brake next to the engine, whereby the train can be controlled. With the flat cars equipped with air brakes, and next to the engine, we would undoubtedly crush those cars with the train by having air brakes on them. For that reason we should not be compelled to put air brakes on flat cars, as the only strength we have in those cars is the floor timbers, while in the ordinary freight cars we have the floor timbers and the superstructure too.

The CHAIRMAN. Now, on what do you have brakes put on?

Mr. SCHROYER. We have brakes put on everything except flat cars.

The CHAIRMAN. Any car except a flat car?

Mr. SCHROYER. Yes, sir.

The CHAIRMAN. Would it be entirely proper to put the air brake on the flat cars.

Mr. SCHROYER. I think it would be an element of danger on the flat car.

The CHAIRMAN. Some gentleman who appeared before the committee yesterday stated that he thought it would be wrong to use the word "automatic" at all in connection with any legislation in reference to brakes, that there were some brakes which were not automatic, and that that provision in the bill would restrict the railroads to a particular sort of device. The whole subject before the committee, as I understand it, is narrowed down to the question of the wisdom of enacting such legislation. We all recognize the importance of having these modern devices, which give greater security to life and prop-

erty adopted by the railroads, and as rapidly as possible. The only question, it seems to me, for the committee to consider is whether these appliances are going to be put on these cars as rapidly as possible without legislation, or whether any legislation is necessary in the interest of the protection of life and property, especially life and limb, and if anything is done in the way of legislation, whether the roads can comply with it in five, six, or seven, or four years, as the case may be.

Mr. SCHROYER. As I understand the matter, there are a great many automatic bars in the country, all claiming to be automatic, but which will not work at all with safety with the present Master Car Builders' standard type of bar, and which they have been to a vast amount of labor in getting to where it now stands. It is a different type of bar. There are to-day automatic types of bars—link-and-pin bars—but they are an entirely different type from what the Master Car Builders' Association have adopted.

The CHAIRMAN. Let me read this provision of Mr. Coffin's bill:

That it shall be unlawful for any corporation, company, person, or persons operating any line of railroad, or for any car or transportation company using or leasing freight cars engaged in interstate commerce, to put into such use any new cars, or cars that have been sent to the shops for general repairs, or when either of whose drawbars need to be replaced with new ones, that are not equipped with safety automatic couplers or drawbars, such as will not necessitate the going in between the ends of the cars to couple or uncouple them, but which will automatically couple themselves, and can be uncoupled from the sides of the cars.

Mr. SCHROYER. We can equip our cars with an automatic drawbar which will not work with any other bar on the market to-day, of the Master Car Builders' type. The type of bar of the Master Car Builders I believe to be the best bar that could be put in the service.

The CHAIRMAN. Do you think that, under that section of Mr. Coffin's bill which I have read, there would be that sort of discretionary power used, or might be used, by the railroads, which would result probably in the adoption of some coupler which would not do at all?

Mr. SCHROYER. It would complicate matters to a greater extent than to-day.

Mr. COFFIN. I stated before the committee that I thought the self-interest of the roads, as indicated by the Master Car Builders, would lead them to uniformity in this matter. The majority of the roads have already decided on that, and some of them are equipping their cars with them.

The CHAIRMAN. Section 7 of Mr. Coffin's bill provides:

SEC. 7. That whenever any railroad company, corporation, person, or persons engaged in the transportation of interstate commerce, or any railroad shall have equipped their rolling stock, either prior to or by the time of the dates fixed in this law, with such automatic safety appliances as contemplated in this act, such corporation, company, person, or persons may lawfully refuse to receive cars for transportation over their own lines, or for switching purposes, from lines of connecting roads, that are not equipped with such automatic safety appliances as will work, interlock, and interchange automatically with the system of automatic couplers and brakes in use on its own rolling stock.

Mr. COFFIN. I design in that to lead to uniformity. That is my design. As I stated before the committee, I think, while we might be able to convince the Commission that there would be no monopoly

created by setting out in so many words the Master Car Builders' coupler, still I was afraid that we could not get a majority in the House and Senate.

Mr. COOK. I should object to that for this reason——

The CHAIRMAN. I would not put——

Mr. COOK. They have not got to perfection, and I would not want to stereotype it where it is.

Mr. COFFIN. Leave it in the hands of your men who know no more about it than anybody else. These other bills provide for a commission.

The CHAIRMAN. I think that is all gone by. Now, Mr. Schroyer, your criticism of this bill—and I think the other two bills are practically out of the question—is that it is too general?

Mr. SCHROYER. *Too general;* yes, sir.

The CHAIRMAN. It leaves the thing open in such a way that they may take advantage of it if a road wants to, and adopt an automatic coupler that would be of no account?

Mr. SCHROYER. Yes, sir.

The CHAIRMAN. And therefore would involve the roads which put on good ones in trouble?

Mr. SCHROYER. Yes, sir.

Mr. COOK. You will obviate that by saying that they shall be such couplers as will couple with all automatic couplers which have these contour lines, which will couple interchangeably.

Mr. SCHROYER. In that bill you ignore all mention of the action which had been taken by a two-thirds vote of the cars represented in the Master Car Builders' Association. You know of the discussion which has taken place in the New England Club on the question of automatic couplers. They favored a link-and-pin bar. No road which has used the automatic bar but did it experimentally. There is an inclination on the part of the trainmen who handle cars with these bars to find out just what they will stand. You know that, Mr. Coffin.

Mr. COFFIN. I know that.

Mr. SCHROYER. And when they have the experiments in the yards they will hit them as hard as they can. The result has been very disastrous in the northeastern country.

Another point is that in the construction of these bars originally they were gotten out as cheaply as possible, regardless of the quality of the material used. They commenced at the bottom to build up rather than to use the better class of bar or better material at an increase in the original cost. Their experience has been disastrous with these bars, as ours was. But now of 2,300 bars which we have now in service, we have had up until the 13th day of this month, in 2,300 cars, 6 broken bars and 6 broken knuckles. That is very much below the cost we have had of maintaining the old bars.

Now, if that bill were to become a law, leaving it discretionary with the railroad companies as to what kind of bars they will adopt, at the end of five years you will not be any better off than you are to-day. If the master car builders' work in this direction is worth anything it is certainly worth enough to be recognized in this bill.

The CHAIRMAN. On the other hand, if we confine it to what the master car builders now consider the right thing, would we not get

them in a groove and retard further progress? Something a great deal better may be discovered inside of six months.

Mr. SCHROYER. No; then you anticipate that somebody will discover something?

The CHAIRMAN. The question is whether the bill should not be open enough and broad enough to allow improvements to go forward.

Mr. SCHROYER. That is a fact. But should it not be close enough to prevent difficulties which are now existing?

The CHAIRMAN. That is the question.

Mr. SCHROYER. We can put on an automatic bar for about 25 per cent of the original cost of the bars that we are now putting on.

Mr. COFFIN. You will not do it, of course, and will not other roads be like you?

Mr. SCHROYER. We will not do it. Other roads will not be like us for the reason that to-day we have 58 different patterns for drawbars in a barn loft, all of which we are using on foreign cars. It is frequently the case that a foreign car will remain in the yards two weeks, so that we can get the patterns to the foundry, have the castings made, and get them ready for use. Now, if convenience and facility in repairing and in the interchange of these cars cut as much figure as they should, the roads would be governed to a greater extent by the action of the Master Car Builders' Association in this respect.

The CHAIRMAN. Now?

Mr. SCHROYER. Yes, sir; but they are not. The only thing that I can see to do is to frame a bill which will harmonize with the work done by the Master Car Builders' Association, whose plan was adopted by a two-third vote of all the cars represented in the association.

The CHAIRMAN. Then when you get that bill and the railroads go on and spend their $100,000,000 in equipping the cars accordingly, and something very much better comes out in a little while, what is to be done? The same laboring element which is now asking legislation would say that "the old Janney coupler is a nuisance, and lots of us are killed and maimed by it, and we want an act of Congress to get a better arrangement."

Mr. SCHROYER. That is true, only it is anticipation.

The CHAIRMAN. Of course.

Mr. SCHROYER. But the other point that I make is in relation to difficulties which actually exist to-day, and which, to my idea, this bill will not prevent.

The CHAIRMAN. A gentleman by the name of Mr. Loughridge, of Philadelphia, was before us yesterday, and he stated that since this agitation had been started, since these bills have been introduced and the hearings have been going on, everybody has got a new invention, everybody wants to come in and exhibit his invention.

Mr. SCHROYER. I will show you the result of the vote. Here it is: 443 against 25; 338 against 127; 408 against 67; 347 against 128; 407 against 51.

The CHAIRMAN. In view of the difficulties which are presented by you, your judgment is that if any legislation is enacted it ought to prescribe the sort of appliance which shall be used?

Mr. SCHROYER. The type of appliances?

The CHAIRMAN. The type of appliance that shall be used?

Mr. SCHROYER. Yes, sir.

The CHAIRMAN. Now, in view of what seems to me to be doubtful legislation, to prescribe what shall be used, because the testimony before us is that in old countries—take Germany, for instance—where the Government owns the road and puts on the cars whatever they please, they are far behind everybody else in other countries; now, then, in view of this state of facts, what is your judgment, that the bill shall or shall not pass?

Mr. SCHROYER. I think it should not.

The CHAIRMAN. Prescribing any time at all.

Mr. SCHROYER. Prescribing any time. I think it will work itself out.

The CHAIRMAN. But if one does pass, how long time do you think ought to be given?

Mr. SCHROYER. Ten years.

Mr. COOK. I think Mr. Coffin knows that the legislation in Michigan complicated the matter.

Mr. COFFIN. I so stated before the committee, and also in Massachusetts and Connecticut, and in New York.

The CHAIRMAN. Would you object to the suggestion of Mr. Cook that a law, if any one should pass at all, should be a law prescribing that all new cars should have these modern appliances attached to them, and that a railroad purchasing old cars should also use them?

Mr. SCHROYER. I would modify that somewhat and exclude flat cars. I do not think it would be a safe practice to put a power brake on a flat car.

The CHAIRMAN. I assume from what you state it would probably not be a good thing to do.

Mr. COFFIN. I want to ask Mr. Schroyer a question. Is it not the fact, or is not in your judgement, that unless we have some law that requires other companies to equip their cars the same as our law now requires you, that you will have a great many cars that will be more dangerous to couple with your cars having automatic couplers than it would be otherwise, and in justice to you ought not other roads be made to do as you do—put on safety appliances?

Mr. SCHROYER. Yes, sir.

Mr. COFFIN. Will they do it unless we have a law of this kind?

Mr. SCHROYER. I think they will. I know roads the mechanical departments of which are bitterly opposed to the use of the M. C. B. bar, but they are putting them on by order of the general officers of the road. They are compelled to do it against their own will, and in that bill framed as you have it now I am totally at a loss to know how you are going to overcome the difficulty you are aiming at. If the bars were not so radically different the conditions would all be changed. But you can not make a link-and-pin bar work with an automatic bar.

Mr. COFFIN. In applying power brakes, does it not necessitate close coupling?

Mr. SCHROYER. It does not absolutely necessitate a close coupling, but it is very much preferable to have a close coupling.

The CHAIRMAN. There are two propositions in this bill; one is the automatic coupler and the other is the power brake. Which is the more important in the interest of life and limb and property?

Mr. SCHROYER. I believe that the coupler is the more important as regards the loss of life and limb, but at the same time that is questionable. I believe that the automatic brake would be the best so far as a saving in money is concerned in operating our cars, but I believe with the use of both that men will take greater chances than they do to-day. I know that to be the case on our road.

The CHAIRMAN. In what way?

Mr. SCHROYER. They will run closer on trains. They will not endeavor to make the stops they would if they were using the hand brakes.

The CHAIRMAN. Which, by carelessness, makes a greater liability of loss and damage to life and limb and property?

Mr. SCHROYER. Yes, sir.

The CHAIRMAN. That is their own fault, it seems to me.

Mr. SCHROYER. It is my opinion that in eight cases out of ten the loss of life and limb now on the part of switchmen is due to their own carelessness.

At 2 o'clock p. m. the committee adjourned.

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51st Congress, 1st Session. HOUSE OF REPRESENTATIVES. Report No. 6041.

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PROTECTION OF EMPLOYEES AND PROPERTY OF RAILROADS.

August 25, 1890.—Referred to the House Calendar and ordered to be printed.

Mr. CALDWELL, from the Committee on Railways and Canals, submitted the following

REPORT:

[To accompany H. R. 9682.]

The Committee on Railways and Canals, to whom was referred the bill (H. R. 9682) for the protection of property and trainmen, and other railroad employees in handling locomotives, engines, freight trains, and freight cars engaged in interstate commerce, beg leave to report the same back to the House with recommendation that it do pass with certain amendments.

The object of this bill, as partly set forth in its title, is to require those using railroad cars in the work of interstate commerce to so equip the cars with such safety or automatic safety couplers as will not require trainmen to go between the ends of the cars to couple or to uncouple them or to go on top of the cars to use hand brakes in controlling the speed of trains, as it is now the general custom to do, resulting in such serious consequences, as shown by the following statements:

In the Railroad Gazette, an authoritative railway journal published in New York, issue of April 26, 1889, is found this startling statement:

> A calculation based upon accident returns in the reports of State commissioners indicates that every year some 2,700 able-bodied men are killed and over 20,000 injured in the discharge of their duties as employees of the railroads of this country.

How many of these casualties are directly traceable to the common link-and-pin method of coupling cars, and to the use of the old hand brake, which this bill seeks to supplant by better and safer methods, are not positively known; still from reliable data we can make a very close approximation. The commission law of Iowa requires the railroads of that State to report every and each kind of accident to the commissioners, and from the reports of the railroads themselves the first ten years of the commissioners' law, from 1878 to 1888, show that with an average of only 6,000 miles of road there were either killed or crippled for life 2,426, and the report of 1888 shows that there were 352 casualties from these two causes in that State with their then 8,000 miles of road.

If the same ratio of casualty to miles holds for the roads of the nation as in Iowa, the 150,000 miles of road in the nation would give the fearful number of 7,040 yearly of these young men who, in handling our trains, have to sacrifice either life or limb to keep in use the link-and-pin coupling and hand brake on freight cars. In the report of the State railroad commissioners of Kentucky for 1889 (pages 75 and 76) this astonishing statement is found:

In this State the number of accidents from the two causes under consideration in proportion to railroad mileage is greater than in Iowa. We report 286 accidents on fourteen roads having a mileage of one-fourth the Iowa mileage, and yet we are but 66 behind the Iowa record of last year in injuries to brakemen from the two causes in question. This indicates the estimates based on the Iowa returns to be much below the fact.

If we take the Kentucky ratio, we have the terrible intimation that twenty thousand young men in this nation must suffer painful or fatal accidents from those two causes annually. We insert for information an extract from the President's message to this Fifty-first Congress, December 3, 1889:

At a meeting of State railroad commissioners and their accredited representatives, held at Washington in May last, upon the invitation of the Interstate Commerce Commission, a resolution was unanimously adopted urging the Commission "to consider what can be done to prevent the loss of life and limb in coupling and uncoupling freight cars and in handling the brakes of such cars." During the year ending June 30, 1888, over two thousand railroad employees were killed in service and more than twenty thousand injured. It is competent, I think, for Congress to require uniformity in the construction of cars used in interstate commerce and the use of improved safety appliances upon such trains. Time will be necessary to make the needed changes, but an earnest and intelligent beginning should be made at once. It is a reproach to our civilization that any class of American workmen should, in the pursuit of a necessary and useful vocation, be subjected to a peril of life and limb as great as that of a soldier in time of war.

Following this railroad commissioners' conference alluded to above, the order of Brotherhood of Railroad Brakemen sent to the Interstate Commission the following petition with nine thousand six hundred and eighty-two names attached:

PETITION OF RAILROAD BRAKEMEN TO THE INTERSTATE COMMISSION.

The members of the Interstate Commerce Commission, Hon. Thomas M. Cooley, Chairman, Washington, D. C.:

GENTLEMEN: We the undersigned respectfully petition your honorable body to take such steps as you may deem proper to bring about the adoption of automatic brakes and couplers on freight cars on the railroads of the United States.

Each of the undersigned is in actual service as a railroad brakeman or has been employed a sufficient length of time to become fully acquainted with the duties and perils of the position, and although some of us have been promoted, we most earnestly appeal to your honorable body to urge upon Congress the necessity of national legislation in this matter, that the terrible slaughter of brakemen on the railroads of this country every year may be largely diminished.

Automatic brakes and couplers are practicable; no one would be injured, and many lives and limbs would be saved by their adoption.

T. T. SLATTERY, N. Y. C. R. R.
E. L. BARNARD, B. & A. R. R.
WM. H. LYONS, B. & A. R. R.
E. M. HARDIE, N. Y. C. R. R.
(And 9,678 others.)

On the 28th and 29th of May, this year, there was held another conference of State railroad commissioners, in the rooms of the Interstate Commerce Commission, in Washington, D. C. One of the main

things discussed at that conference was this matter of greater safety to trainmen, and after full discussion the following resolutions were unanimously passed:

Resolved, That the respective States should require, either directly, by law, or indirectly, through the instrumentality of their railroad commissions, each railroad corporation subject to their jurisdictions to place driving-wheel brakes and apparatus for train brakes upon every freight car hereafter constructed or purchased by it, and also upon such cars and upon every freight car owned by it, the coupler or drawbar of which is repaired by it, an automatic coupler, of the Master Car Builders' type, at each end of the car.

Resolved, That Congress, either directly, by law, or indirectly, through the instrumentality of the Interstate Commerce Commission, should take similar action.

Since this bill was introduced in this House the following letters have been received from the grand officers of the several orders of railroad men's organizations and referred to your committee:

First:

GRAND LODGE OF THE BROTHERHOOD OF RAILROAD TRAINMEN,
OFFICE OF GRAND SECRETARY AND TREASURER,
Galesburg, Ill., May 12, 1890.

DEAR SIR: We have carefully examined H. R. 9682, and are convinced that it fully covers the ground, and if made a law will have the effect of saving the lives of thousands of trainmen. The provisions of the bill are thoroughly practical, and we hope to see it pass both branches of the national legislature without any amendment whatever. The Brotherhood of Railroad Trainmen, of which we are the chief officers, embraces a membership of nearly 20,000 practical railroad men in actual train service, and on their behalf we earnestly request you to do all in your power in favor of this measure.

Sincerely, yours,

S. E. WILKINSON,
Grand Master.
W. A. SHEAHAN,
Grand Secretary and Treasurer.

And second:

GRAND LODGE BROTHERHOOD OF LOCOMOTIVE FIREMEN,
Terre Haute, Ind., May 5, 1890.

DEAR SIR: Referring to House bill 9682, introduced into the House of Representatives by Mr. Henderson, of Iowa, I beg to say, after a careful perusal of its provisions, that I fully indorse the measure, and hope it may become a law at the earliest practicable moment, and I have no doubt I voice the sentiments of each and every one of the eighteen thousand members of our organization upon that proposition.

We are profoundly interested in such legislation as proposed by the adoption of safety appliances to protect railway trainmen in the discharge of their hazardous duties, and as the measure in question, if enacted as a law, would be fruitful of incalculable benefits, we heartily favor its adoption, and shall give it all the support in our power.

Yours, very truly,

EUGENE V. DEBS,
Grand Secretary.

We also append a letter from the officers of the Grand International Brotherhood of Locomotive Engineers, an order well known to every member of Congress:

OFFICE OF THE GRAND INTERNATIONAL
BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Room 5, Blackstone Block, Seneca Street, Cleveland, Ohio, May 3, 1890.

MY DEAR SIR: I am in receipt of your esteemed favors of the 25th and 30th ultimo, with House bill 9682 inclosed. Messrs. Arthur, Ingraham, Everett, and I myself, after a careful perusal of the same, desire to say we are in hearty accord with you in this movement and the principles of the bill. We consider it the duty of Congress at this time to adopt by law a measure which will be

acceptable to railway managers and employees alike, whereby the lives and limbs of thousands in railway service which are year by year sacrificed may be saved. It is an indisputable fact that Congress has the prerogative, and science has provided a remedy for this growing evil. I am instructed to say by my associates in office that the object to be attained is deserving of our personal consideration and support, which we cordially give; not only this, but will venture even to break an established custom adopted here and place our names on the margin of this letter as an indorsement of your efforts in the behalf of employees in train service. May you succeed in your laudable efforts, and may the Representatives of Congress give, as the true representatives of the laboring element of this country, a measure that must prove a relief and benefit to the railway servants as well as to the public.

With best wishes, very truly, yours,

MESSRS. ARTHUR, INGRAHAM, EVERETT, and HAYS,
Grand Officers Brotherhood of Locomotive Engineers,
Per H. C. HAYS, *F. G. A. E.*

At the annual meeting of the "Grand Division" of the "Order of Railroad Conductors," embracing some 20,000 members in its membership, held in Rochester, N. Y., May 13 to 21, the following resolution was adopted:

Whereas it is now an admitted fact that thousands of yard and train men are annually killed and maimed for life by the continued use of the old link-and-pin method of coupling cars, and by the use of the hand brake on freight cars; and

Whereas it is now demonstrated beyond all doubt that there are practical safety automatic couplers and car brakes, which if universally applied to freight cars would in a great measure prevent this fearful sacrifice of life and limb; and

Whereas believing that it is the prerogative of Congress to legislate for the safety and protection of the large class of men who are engaged in the transportation of interstate commerce, and that the bills now before Congress, viz, the S. bill No. 8665, introduced in the Senate by Senator Allison, of Iowa, and H. R. bill No. 9682, introduced in the House by Colonel Henderson, of Iowa, would, if enacted into law, greatly conduce to this end: Therefore

Resolved, By this National Order of Railway Conductors in their annual convention assembled, that we respectfully ask of Senator Cullom, chairman of Committee on Interstate Commerce of the Senate, and of Representative McCormick, chairman of Committee on Railroads and Canals of the House, to use their best endeavors to secure a speedy favorable report upon the bills named and now before them for consideration.

Yours, very truly,

WM. P. DANIELS, *G. S. and T.*

The National Association of Railway Surgeons, a body of men who are especially employed by railroad companies to attend their employees in cases of accidents, in their annual convention held in Kansas City on the 2d of May last, adopted the following resolution:

Resolved, That we favor the enactment by Congress of the law requiring the use of automatic couplers and brakes on freight cars.

These men are daily and hourly brought in professional contact with the sufferings caused by these old appliances, and hence speak intelligently.

In addition to this there has been received and referred to your committee the following petition, signed by over ten thousand of these very men who are daily and hourly doing the necessary work of assisting in the commerce of the nation at the fearful risk to life and limb which the statistics we have produced indicated:

To the honorable members of the Senate and House of Representatives, U. S.:

GENTLEMEN: We, the undersigned, do respectfully petition your honorable body to pass favorably upon House bill 9682, entitled "A bill for the protection of property, trainmen, and other railroad employees in handling locomotive

engines, freight trains, and freight cars engaged in interstate commerce." Each of the undersigned is in actual service as a railroad trainman or yardman, and has been so employed a sufficient length of time to become fully acquainted with the duties and perils of the position, and, believing that the passage of said bill would reduce the death rate among us fully 50 per cent, we earnestly appeal to you to leave nothing undone to make H. R. bill 9682 a law of the land.

That the third annual report of the Interstate Commerce Commission, which doubtless every member has, shows the fact that a brakeman has only about one chance in five to die a natural death, is enough of itself to warrant a favorable report upon the bill.

The principal objection that can be brought against the passage of the bill is that of the cost it will be to the railroads. Perhaps in the end the outlay for safety and automatic couplers and power brakes would be a good investment, aside from the question of humanity. But admitting the weight of the plea of expense, are there not two sides to this question of cost?

So great is the risk to life in the brakeman occupation that insurance companies refuse to carry the risk of a freight brakeman's life, and these brakemen have been forced to organize their Brotherhood of Railroad Brakemen to carry their own risks.

The maximum sum for total disability allowed is $1,000. The Brotherhood of Brakemen now numbers in its order about one-fifth of the brakemen of this nation, and still they pay an average of a total disability daily. (See letter of their grand secretary and treasurer to Interstate Commerce Commission, page 338 of report for 1889.)

This means that these brakemen out of their scanty wages pay not less than $365,000 annually to their unfortunate brothers, and to their families. If the order included all the brakemen of the nation, then at the same rate they would pay from their limited funds $1,825,000, almost $2,000,000, annually, for disabilities which in nine cases out of ten are traceable to the old couplings and brakes. This disposes of the money argument.

Now, when it is remembered that of the thousands of brakemen injured and killed yearly not 1 per cent of these are injured in coupling passenger cars, or of handling brakes on such cars, simply because these cars have automatic couplers, and besides are equipped with power brakes, controlled by the engineer, and when also it is now well known that automatic couplers and power brakes are as practically applicable to freight as to passenger cars, to require the equipment of locomotives and cars with these appliances, which are, as a rule, patented, might tend to create monopolies among their manufacturers, whereby the price might be made extortionate.

To prevent the possibility of this, your committee recommend the adoption of the amendment to be numbered 13. We know of no better way in which to prevent combinations among manufacturers of the appliances than to allow the Interstate Commerce Commission to see that in complying with the provisions of the law extortion can not be practiced upon the railroad companies, and thereby indirectly upon all the people who contribute to reasonable income of railroads.

Your committee recommend the passage of this bill with the following amendments, viz:

Amendment No. 1.—In section 1, line 5, strike out the words "or leasing."

Amendment No. 2.—In section 1, line 9, insert after the word "safety" the words "couplers or."

Amendment No. 3.—In section 1, line 9, insert after the word "automatic" the word "safety."

Amendment No. 4.—In section 1, line 12, strike out the word "and" and insert the word "or" in place thereof.

Amendment No. 5.—In section 2, line 4, strike out the words "or leasing."

Amendment No. 6.—In section 2, line 7, insert after the word "with" the words "one of."

Amendment No. 7.—In section 2, line 8, strike out the word "automatic."

Amendment No. 8.—In section 3, line 5, after the word "ninety," strike out the word "two" and insert the word "three" in place thereof.

Amendment No. 9.—In section 3 strike out line 7.

Amendment No. 10.—In section 4, line 7, strike out after the word "train" the words "as passenger trains are now controlled by the engineer," ending on line 8.

Amendment No. 11.—In section 4, line 9, after the word "cars," strike out remainder of the section.

Amendment No. 12.—Strike out section 5.

Amendment No. 13.—Strike out section 8 and insert in place thereof as follows:

SEC. 7. It shall be the duty of each railway company to which this act applies to submit to the Interstate Commerce Commission a sample or description of the appliance with which it is proposed to equip the engine and cars operated by such company, and on application of any railroad company the said Interstate Commerce Commission shall fix a maximum price for any of said safety or automatic couplers and power brakes, of which said companies shall be required to equip their cars and engines, and in the event of said approved appliances, or either, not being purchasable in market at a price not exceeding the maximum fixed by the said Commission, then and in that case the Interstate Commerce Commission shall so certify, and such certificate may be used as evidence in the trial of any action under this act and relieve the railroad companies from penalties herein prescribed.

We, the undersigned members of the Committee on Railways and Canals, House of Representatives, hereby consent that the foregoing bill (H. R. 9682) shall be reported favorably as amended and shall be submitted with the foregoing report, and that Hon. John A. Caldwell be authorized to make the report.

HENRY C. MCCORMICK,
Chairman.
J. H. SWENEY.
CHAS. S. RANDALL.
JNO. A. CALDWELL.
C. A. O. MCCLELLAN.
RUFUS E. LESTER.
S. E. PAYNE.
L. P. FEATHERSTON.
WILLIAM C. WALLACE.
P. G. LESTER.

O

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

No. [illegible]

W. O. JOHNSON,

Petitioner,

vs.

SOUTHERN PACIFIC COMPANY,

Memorandum of Respondent, the Southern Pacific Company, in Opposition to the Application of Petitioner for a Writ of Certiorari, and to the Motion of the United States for Leave to Intervene.

MAXWELL EVARTS,
MARTIN L. CLARDY,
HENRY G. HERBEL,
Of Counsel for Respondent.

C. G. Rollinson, Walker and Canter Streets, N. Y.

In the Supreme Court of the United States,

OCTOBER TERM, 1902.

No.

W. O. JOHNSON,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY.

Memorandum of Respondent, the Southern Pacific Company, in Opposition to the Application of Petitioner for a Writ of Certiorari, and to the Motion of the United States for Leave to Intervene.

This is an ordinary suit for damages for personal injuries sustained by petitioner while in the employ of the Southern Pacific Company, as a brakeman, in consequence of the alleged negligence of respondent in failing to equip its engine and car with automatic couplers that would couple by impact, in accordance with the Act of Congress of March 2, 1893, the material parts of which are as follows:

"AN ACT to promote the safety of em-

ployees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving wheel brakes, and for other purposes.

"SECTION 1. That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power-driving wheel brake and appliances for operating the train brake system. * * *

"SEC. 2. That on and after the first day of January eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars. * * *

"SEC. 6. That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled

or used on its line any car in violation of any of the provisions of this act, shall be liable to a penalty of one hundred dollars for each and every such violation. * * *

"SEC. 8. That any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge."

27 Stat., c. 196, p. 531.

This suit was instituted in the District Court of Box Elder County, Utah, on October 6, 1900, and was removed to the Circuit Court of the United States for the District of Utah, where it was tried on June 29, 1901, and resulted in a verdict for the defendant, on an instruction given the jury at the instance of defendant, at the close of plaintiff's evidence, and a judgment was entered accordingly, which was affirmed by the Circuit Court of Appeals, for the Eighth Circuit, on August 28, 1902. No motion for a rehearing was ever filed by plaintiff.

The pleadings are fairly described in petition-

er's application. The facts developed at the trial were as follows: On the morning of the accident to plaintiff, August 5, 1900, an east-bound through passenger train running between San Francisco and Ogden, being behind time, dropped the dining car "Del Monte" at Promontory, Utah, a small town west of Ogden, in order that it might be picked up by the 5 o'clock P. M. west-bound through California passenger train, as it could not reach Ogden in time to return on that train. As the conductor of the dining car desired to have it turned around so that the kitchen part thereof would be in the rear of the west-bound train, he had the train despatcher at Ogden telegraph the conductor of a west-bound through freight train, running between Ogden and Carlin, to turn the car around. When this freight reached Promontory, where the dining car was standing on a side track, plaintiff, who was head brakeman on this freight train, and an experienced railroad man (as he had been engaged in railroading about twelve years, six of which were in defendant's service, two years as engine wiper, two years as fireman and two years as brakeman) was directed by the conductor of his train to detach the engine from his train, run it

forward and couple it to the dining car and haul it to the turn table, there to be turned around. In pursuance of this order, he disconnected his engine from the train, ran ahead of it and threw a switch to let it in on the sidetrack on which the dining car was standing (Record, p. 14); but when the front of the engine reached the dining car, he saw that he could not make an automatic coupling therewith, because the engine was equipped with a Janney coupler and the dining car was equipped with a Miller hook coupler. While both these couplers are automatic in their construction (Record, pp. 14 and 21), they will not work together for the reasons stated by plaintiff himself, "that the Miller hook is on the same side as the Janney and, instead of coupling, passes over it." (Record, pp. 16 and 23). He therefore proceeded to make the coupling with a link and pin, the customary way in such cases. He at the same time observed that the coupler on the dining car was slightly tipped, by reason of some bolts—which kept the carrying iron on which it rested in place—being loose, which rendered the coupling a little more difficult than it would otherwise have been; but that fact would not have constituted a defect had the car been

used in conjunction with another Miller hook coupler, with which it would have worked all right; that while fully conscious of the danger of making such a coupling, he did not regard the slight tipping of the Miller coupler of sufficient consequence to report it to his conductor or the yardmaster, as he acknowledged that it was his duty under the printed rules and regulations of defendant to have done, a copy of which he had been furnished with and with which he was perfectly familiar. As the first attempt to make the coupling failed, he tried it again, and again failed; then tried it the third time, and his arm was caught between the bumpers and crushed. He stated that he had made the same kind of a coupling a hundred times before and well knew its dangers.

We desire here to correct an inaccurate statement of fact made by counsel for petitioner, on page 5 of his supplemental statement, to the effect that plaintiff Johnson was unfamiliar with the "Miller" coupler. Johnson himself testified (see Record, p. 14):

> "I have made the same kind of coupling before hundreds of times;"

And again at page 15 of the Record;

"Q. Did you know the difficulties in regard to coupling cars? A. Yes sir, I knew what the difficulty of the coupler was because it was a Janney and a Miller and I most certainly knew that it was a 'difficulty coupler.' It was dangerous to go between those cars, but I was ordered to do it. I knew that it was a dangerous coupler, but I was taking my time. I was trying three different times."

The opinion of the Circuit Court of Appeals was written by Judge SANBORN and concurred in by Judges THAYER and LOCHREN, Judge THAYER, however, dissenting from that part of the opinion which held that the Act of Congress did not apply to engines and that the dining car was not engaged in interstate traffic at the time of the accident, but agreed to an affirmance of the judgment on the ground that the evidence showed that both the engine and dining car were, in fact, equipped with automatic couplers, though of a different pattern, and that inasmuch as the Act of Congress did not prescribe the kind of coupler to be used, that the equipment of the engine and car with any kind of an automatic coupler was a substantial compliance with the Act. The opinion speaks for itself, and seems to be unanswerable.

Inasmuch as the Statute (*March 3, 1891; C. 617, p. 36, U. S. Stat.*) creating the Circuit Court of Appeals, provides that decisions of that Court shall be final in actions of this character, unless this Court, in the exercise of its supervisory power, sees fit to require, by *certiorari* or otherwise, that the case be certified to it for review and consideration, and this Court has on several occasions declared that this power will be sparingly exercised, and "only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more Courts of Appeal, or between Courts of Appeal and the Courts of a State, or some matter affecting the interest of this Nation, in its internal or external relations, demand such exercise" (*Forsyth vs. Hammond, 166 U. S., 514*), it behooves us to inquire whether petitioner has brought himself within the exception.

The reasons assigned by him for invoking the aid of this extraordinary remedy are:

1. That great injury has been done him by the error of the Court of Appeals in affirming the judgment.

2. That the case is one of great public im-

portance because the question of when a car is engaged in interstate commerce, is involved.

3. That many similar cases have arisen under the Act.

4. That there is a conflict of decision as to the meaning of the Act.

Of these reasons in their order:

As to the first of these reasons we have to say, that it is not to be found in the specification of reasons prescribed by this Court for its interference. It is only when "some matter affecting the interest of the nation in its internal or external relations demands such exercise," that it will be exercised. The power to finally determine controversies of this sort must of necessity be lodged somewhere, and the law makers have declared that it shall be in the Court of Appeals in this instance. Petitioner has not only had his day in court, but has had the benefit of the decision of a reviewing court on appeal. The mere fact that he claims that the Court of Appeals erred in its construction of this statute, is no reason for giving him a right not awarded to every other litigant, viz., the benefit of a second appeal.

Moreover, the fact that he did not file a motion

for a rehearing in this case, and thus give the Court of Appeals an opportunity to correct its errors, if any were committed, ought, it seems to us, estop him from claiming any such extraordinary relief as is here sought.

In many jurisdictions such a prerequisite is prescribed, and it is certainly a reasonable condition.

In re Huddleston, 31 So., 147.

The second reason assigned, viz., that the case is one of great public importance, because the question of when a car is engaged in interstate commerce is involved, is likewise insufficient to call forth this extraordinary power.

The mere fact that the negligence of defendant consisted of the alleged violation of an Act of Congress and that the Court of Appeals was called upon to construe such an Act, does not distinguish this case from thousands of others in which violations of other Acts of Congress, State Laws and City Ordinances, regulating the operation of railroads, are necessarily involved.

We venture the assertion, that where one life is lost or injury inflicted by the alleged violation of the Statute in question, fifty are lost or inflicted by alleged violations of State Laws or City Ordinances.

So that the importance of the principles involved in this case, is considerably dwarfed by comparison.

Of course, we are far from contending that Statutes of this character are not important. Any law which has for its purpose the protection of human life falls within that category. We are simply contending that the principles involved in this case are not so far out of the ordinary run of cases as to deserve exceptional treatment.

But however this may be, the question broached is not a novel one, for the opinion of the Court of Appeals in this case is based upon several decisions of this Court, which define the characteristics of interstate commerce and traffic. The leading case, and one which is cited oftener than any other is *Coe vs. Town of Errol, 116 U. S., 517.* The doctrine of that case has been steadfastly adhered to by this Court and has only recently been cited again with approval in the case of *Diamond Glue Co. vs. U. S. Glue Co., 187 U. S., 616.* Copious extracts from it are incorporated in the opinions of this Court in the cases of

Kidd vs. Pearson, 128 U. S., 24, and
U. S. vs. E. C. Knight Co., 156 U. S., 13.

It is also sustained by the rulings of this Court in the cases of

Smith vs. Alabama, *124 U. S.*, *482*,
St. Louis vs. Ferry Co., *11 Wall.*, *431*.
Morgan vs. Louisiana, *118 U. S.*, *465*.
Pullman Co. vs. Pa., *141 U. S.*, *25*.
Postal Tel. Co. vs. Adams, *155 U. S.*, *698*.
Adams Ex. Co. vs. Ohio, *165 U. S.*, *194*.
Am. Ref. Trans. Co. vs. Hall, *174 U. S.*, *70*.

See also cases of

Norfolk, etc., Ry. vs. Commonwealth, *24 S. E.*, *838*,
U. S. vs. Boyer, *85 Fed.*, *432*,
Kelley vs. Rhoads, *63 Pac.*, *935*,
Cottling vs. Stock Yds., *82 Fed.*, *844*,
Union Trans. Co. vs. Lynch, *55 Pac.*, *643*,

in all of which the interstate character of vehicles and freight is discussed.

The third reason, viz.: that many similar cases have arisen under this Act, if true, does not concern petitioner. No specification of the cases referred to, or the places where pending, is made, hence this reason must of necessity be treated as a mere generality.

The last reason, viz.: that there is a conflict

of decision as to the meaning of the Act, does not argue that the decision of the Court of Appeals is erroneous. There are only four cases cited by petitioner which it is claimed are in conflict with the decision in this case, viz.: *Mallott, Recr., vs. Hood, 99 Ill. App., 360; Fleming vs. Ry., 131 N. C., 476; Winkler vs. Ry., 53 Atl., 90; and Voelker vs. Ry., 116 Fed. Rep., 867.*

An examination of these cases will, we think, convince the Court that there is no real conflict between them and the decision of the case at bar.

It is perhaps inaccurate to say, that they *conflict* with the case at bar, for none of them was in a Court that would be governed by the decisions of the Court of Appeals, with the possible exception of the *Voelker* case, *116 Fed. Rep., 867*, which was decided by District *Judge Shiras* on the Circuit, and whose observations on the subject were pure dictum, because the car in controversy there was laden with interstate freight, and was so stated by him to be.

The *Mallott* case, *99 Ill. App., 360*, was decided by an inferior State Court of Appeals, but with all that, there is nothing in it that militates against the ruling in this case.

It simply held that the failure to prove that

the car in question contained interstate freight was not a fatal error, when it appeared that "the train of which the car in question was a part was engaged in interstate commerce, carrying stock and merchandise from one State to another; and the car itself was attached where the train was made up, at East St. Louis and *billed through* to Indianapolis."

The Interstate Commerce Act was not involved in the *Fleming* case, *131 N. C., 476*, but the doctrine of that case is at war with every other case on the subject, because it holds that at common law the failure to equip locomotives with automatic couplers is negligence *per se*.

The *Winkler* case, *53 Atl., 90*, simply contains the charge to a jury of the Judge of the Superior Court. As the coupling in the case at bar was made to the front end of the engine (Record, p. 14) and not to the tender, the charge that the *tender* was a car is inapplicable.

None of these cases are supported by the logical reasoning of the learned Judge who wrote the opinion in this case. We feel confident that the mere reading of the opinion will be sufficient to convince this Court that no other conclusion could have been reached by that Court. It re-

quires but a superficial glance at the Act in question to see that it does not require the equipment of locomotive engines with automatic couplers. The first section of the Act applies to locomotives only, and simply requires them to be equipped with power *brakes*. The second section applies to *cars* only, and requires them to be equipped with *automatic couplers*. Nothing whatever is said about *couplings* on the *engines*.

The title to the Act also observes this distinction, viz.: "to equip their *cars* with automatic *couplers* and their *locomotives* with driving wheel *brakes*."

As this is a penal Statute (see Sec. 6), it must needs receive a strict construction.

The necessity however for settling these questions has been obviated by the amendment of the act in question at the last session of Congress (33 Stats., 943, March 2, 1903), so as to include engines and make it applicable to all kinds of couplers. The new Act reads as follows:

> "AN ACT to amend an act entitled 'AN ACT to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers

and continuous brakes, and their locomotives with driving-wheel brakes and for other purposes,' approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six.

"BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That the provisions and requirements of the Act entitled 'An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving-wheel brakes, and for other purposes,' approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six, shall be held to apply to common carriers by railroads in the Territories and the District of Columbia, and shall apply in all cases, whether or not the couplers brought together are of the same kind, make or type; and the provisions and requirements hereof and of said acts relating to train brakes, automatic couplers, grab irons and the height of drawbars shall be held to apply to all trains, locomotives, ten-

ders, cars and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars and similar vehicles used in connection therewith, excepting those trains, cars and locomotives exempted by the provisions of section six of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, or which are used upon street railways. * * *

"SEC. 3. That the provisions of this Act shall not take effect until September first, nineteen hundred and three. Nothing in this Act shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any United States District Attorney from any of the provisions, powers, duties, liabilities, or requirements of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six; and all of the provisions, powers, duties, requirements and liabilities of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, shall, except as

specifically amended by this Act, apply to this Act.

Public No. 133, approved March 2, 1903, Second Session, Fifty-seventh Congress."

This amendment following so close upon the decision of this case, is strong persuasive evidence that the Act was defective in these particulars, and, in our judgment, completely vindicates the action of the Court of Appeals in deciding this case as it did.

All of the foregoing observations apply with equal force to the suggestion of the Solicitor-General of the United States, that he be permitted to intervene in this case. We, however, desire to add that it would seem as if the proper time for the Government to file an application for intervention was after the case had reached this Court and that the practice of the United States in asking to intervene in this Court before the case gets here should not be encouraged. The time for the Government to ask leave to intervene is after the writ of certiorari is issued (in case the petition is granted) and not before.

The case is not one of such great public con-

cern as to justify this Court in resorting to this extraordinary remedy. If there was any doubt about the correctness of the Court of Appeals' conclusions, it has been removed by the legislation above referred to. No good or useful purpose can be subserved by granting a review of this case. If the Interstate Commerce Commission wishes to further test the old law, the door is open to it to do so by direct methods, viz.: a suit to recover the penalties provided for violating the Act, in the manner prescribed by Section 6 of the Act itself.

It is therefore respectfully submitted that the petition should be denied.

MAXWELL EVARTS,
MARTIN L. CLARDY,
HENRY G. HERBEL.
Of Counsel for Respondent.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

W. O. JOHNSON,
Petitioner,
vs.
SOUTHERN PACIFIC COMPANY,
Respondent.
No. [illegible]

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

W. O. JOHNSON,
Plaintiff in Error,
vs.
SOUTHERN PACIFIC COMPANY,
Defendant in Error.
No. 87.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF ON BEHALF OF RESPONDENT.

MAXWELL EVARTS,
MARTIN L. CLARDY,
HENRY G. HERBEL,
Of Counsel for Respondent and Defendant in Error.

C. G. BURGOYNE, Walker and Centre Streets, N. Y.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

W. O. JOHNSON,
Petitioner,
vs.
SOUTHERN PACIFIC COMPANY,
Respondent.
No. 32.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

W. O. JOHNSON,
Plaintiff in Error,
vs.
SOUTHERN PACIFIC COMPANY,
Defendant in Error.
No. 87.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF ON BEHALF OF RESPONDENT.

Statement.

Counsel have agreed that both these cases shall be argued and submitted together. See

stipulation in record of case No. 32, p. 47, and in case No. 87, p. 6.

This is an action for damages for personal injuries sustained by plaintiff—who was a brakeman in defendant's employ—while engaged in attempting to couple a freight engine, equipped with a Janney automatic coupler, to a dining car, eduipped with a Miller automatic coupler, at Promontory, Utah, on the fifth day of August, 1900.

The negligence charged in the petition is the alleged violation of an Act of Congress (27 U. S. Stat. at Large, p. 531) commonly known as the "Interstate Commerce Act," which requires that all *cars* engaged in interstate traffic shall be equipped with "couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars," by failing to equip the engine and dining car, which plaintiff was attempting to couple, with couplers which would couple automatically by impact.

While there was an incidental allegation of a defect in the dining car, it was not an issuable fact in this case, for the reasons hereinafter stated.

As the Act of Congress, referred to, will necessarily receive a large share of this Court's atten-

tion in the consideration of this case, we will here copy so much thereof as is pertinent to the issues involved:

INTERSTATE COMMERCE ACT.

"An Act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes.

"BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic after said date, that has not a sufficient number of cars in it so equipped with power or train brakes, that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.

"SEC. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic, not equipped with couplers, coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

* * * * * *

"SEC. 6. That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this Act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States District Attorney in the District Court of the United States having jurisdiction in the locality where such violation shall have been committed, and it shall be the duty of such District Attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred. And it shall also be the duty of the Interstate Commerce Commission to lodge with the proper District Attorneys information

of any such violations as may come to its knowledge: Provided, that nothing in this Act contained shall apply to trains composed of four-wheel cars or to locomotives used in hauling such trains.

* * * * * *

"SEC. 8. That any employe of any such common carrier who may be injured by any locomotive, car or train in use contrary to the provision of this Act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car or train had been brought to his knowledge.

"Approved March 2, 1893."

The answer was a specific denial of all the allegations of the petition excepting the allegations that the defendant was a common carrier engaged in interstate traffic; that plaintiff was head brakeman of a freight train engaged in interstate commerce, and that the engine was equipped with a Janney coupler and the dining car with a Miller hook coupler, which would not couple automatically by impact. These facts were admitted. The defendant, however, specifically denied that said engine and dining car were being used in moving interstate traffic at the time of

plaintiff's injury, or that it was under any duty to have its engine and dining car equipped with automatic couplers at the time and place of plaintiff's injury, and alleged that whatever injuries plaintiff sustained were the result of his own negligence and carelessness in failing to observe and heed the printed rules and regulations of defendant, a copy of which had been furnished him by defendant, and with which he was perfectly familiar, and in exposing himself to dangers which were obvious and well known to him, but were unknown to defendant because of his neglect of duty. One of said rules was specifically pleaded as follows (Record, p. 9):

RULE 59.

"Great care must be exercised by all persons when coupling cars. Inasmuch as the couplers of cars and engines cannot be uniform in style or strength, and are liable to be broken from various causes, so as to render it dangerous to expose the hands, arms or persons of those engaged in making couplings, all employes are *enjoined* before coupling cars or engines, to *examine* and to *know* the kind and condition of the drawhead, drawbar, link and coupling apparatus, and are forbidden to place in trains any car with

a defective coupling, until they shall have reported the effect to the conductor or yard-master. Sufficient time may be taken by employes in all cases to make the examination required."

No reply was filed to defendant's answer.

The facts developed at the trial were substantially as follows: On the morning of the accident to plaintiff, August 5, 1900, an east-bound through passenger train running between San Francisco and Odgen, being behind time, dropped the dining car "Del Monte" at Promontory, Utah, a small town west of Odgen, in order that it might be picked up by the 5 o'clock P. M. west-bound through California passenger train, as it could not reach Odgen in time to return on that train. As the conductor of the dining car desired to have it turned around, so that the kitchen part thereof would be in the rear of the west-bound train, he had the train despatcher at Ogden telegraph the conductor of a west-bound through freight train running between Ogden and Carlin, to turn the car around. When this freight reached Promontory, where the dining car was standing on a side track, plaintiff, who was head brakeman on this freight train, and an experienced railroad man (as he had been engaged

in railroading about twelve years, six of which were in defendant's service, two years as engine wiper, two years as fireman and two years as brakeman), was directed by the conductor of his train to detach the engine from his train, run it forward and couple it to the dining car and haul it to the turn-table, there to be turned around. In pursuance of this order, he disconnected the engine from the train, ran ahead of it, and threw a switch to let it in on the side track, on which the dining car was standing (Record, p. 14). When the front of the engine reached the dining car, he saw that he could not make an automatic coupling therewith, because the engine was equipped with a Janney coupler and the dining car was equipped with a Miller hook coupler. While both these couplers are automatic in their construction (Record, pp. 14, 20 and 21), they will not work together for the reasons stated by plaintiff himself, "that the Miller hook is on the same side as the Janney, and, instead of coupling, passes over it" (Record, pp. 14 and 23). He, therefore, proceeded to make the coupling with a link and pin, the customary way in such cases. He at the same time observed that the coupler on the dining car was slightly

tipped, by reason of some bolts—which kept the carrying iron on which it rested in place—being loose, which rendered the coupling a little more difficult than it would otherwise have been; but that fact would not have constituted a defect had the car been used in conjunction with another Miller hook coupler, with which it would have worked all right; that while fully conscious of the danger of making such a coupling, he did not regard the slight tipping of the Miller coupler of sufficient consequence to report it to his conductor or the yardmaster, as he acknowledged was his duty, under the printed rules and regulations of defendant, a copy of which he had been furnished with, and with which he was perfectly familiar. As the first attempt to make the coupling failed, he tried it again, and again failed. He then tried it the third time, and his arm was caught between the bumpers and crushed. He stated that he had made the same kind of a coupling a hundred times before and well knew its dangers (Rec.,p.14).

At the close of plaintiff's case, the Court directed the jury to return a verdict for the defendant, which was done. To correct that alleged error, plaintiff sued out a writ of error in the United States Circuit Court of Appeals for

the Eighth Circuit, where the judgment of nonsuit was affirmed and an opinion written by Judge SANBORN which was concurred in by Judges THAYER and LOCHREN. Judge THAYER, however, dissented from that part of the opinion which held that the second section of the Act of Congress did not apply to engines, and that the dining car was not engaged in interstate traffic at the time of the accident, but agreed to an affirmance of the judgment on the ground that the evidence showed that both the engine and dining car were, in fact, equipped with automatic couplers, though of a different pattern, and that, inasmuch as the Act of Congress did not prescribe the kind of coupler to be used, that the equipment of the engine and car with any kind of an automatic coupler was a substantial compliance with the Act. These opinions are reported in the 117 Fed. Rep., 462 and 54 Circuit Court of Appeals, 508. See also printed record, pp. 34 and 45.

This opinion was delivered on the 28th day of August, 1902, and plaintiff in error did not file any petition for a re-hearing, but acquiesced in said ruling until May, 1903, when he filed his petition in this Court for a writ of *certiorari*. On the same day the Interstate Commerce Commis-

sion filed its application for leave to intervene therein. The writ of *certiorari*, was allowed on the 3d day of June, 1903.

ARGUMENT.

FIRST.

The Dining Car was not an Interstate Car.

Our first contention is that, as the dining car was not being used in moving interstate commerce, and plaintiff's act in coupling it had no relation to such use at the time of his injury, it does not fall under the ban of the interstate commerce act. In other words, at that time and place it was not in legal contemplation an interstate car. While we concede that it had been in that service, and might be thus used again, yet we insist that, until so used or in the act of being put into a train for such use, it maintained its local character.

This view is supported by an opinion of the Supreme Court of Virginia in the case of Norfolk, etc., Ry. vs. Commonwealth, 93 Va., 749, 752, in which the character of a train of empty coal cars, which were *en route* to a loading station to be loaded with interstate freight, was

involved. The defendant railroad company had been indicted for running empty cars on Sunday in violation of Section 3801 of the Virginia Code. The defense was that the statute had no application to cars engaged in interstate commerce. It was held that the cars being empty were not then engaged in interstate commerce. The reasoning of the Virginia Court is based upon the decision of this Court in the case of Coe vs. Erroll, 116 U.S., 517, and, as its logic applies with equal force to the case at bar, we can do no better than quote it as a part of our argument on this proposition.

> "The train, which the plaintiff company was indicted for running in violation of Section 3801 of the Code, was made up entirely of empty cars, which, it was agreed, were used exclusively in carrying articles of interstate commerce.
>
> "The fact that they had been so used in the past, and were intended to be so used in the future, does not show that they were, at the time when the act was done, for which the plaintiff company was indicted, engaged in interstate commerce.
>
> "The Supreme Court of the United States in Coe vs. Erroll, 116 U. S., 517, 525, held:
>
> "When the products of the farm or the forest are collected and brought in from the

surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State. Until then it is reasonable to regard them as not only within the State of their origin, but as a part of the general mass of property of that State, subject to its jurisdiction and liable to taxation there, if not taxed by reason of their being intended for exportation, but taxed without discrimination in the usual way and manner in which such property is taxed in the State.'

" If this be the true rule by which to determine when the products of the mine become articles of interstate commerce, and cease to be controlled entirely by the laws of the State, why is it not the correct rule to determine when the carrier of such products becomes engaged in transporting interstate commerce, and is protected and governed by the laws of the United States? In the one case the miner may intend to ship a particular product to another State, and may be

preparing the article for shipment, yet it is not an article of interstate commerce *until it starts upon its final destination* to that State, and, until that time, is subject to the laws of the State alone, and has none of the rights of an article of interstate commerce. In the other case, the carrier may be preparing certain cars upon which to transport the products of the miner to the foreign State, and they may be on their journey to the place from which they are to be shipped, yet why should those cars be considered as engaged in interstate commerce until they are loaded with articles committed to the carrier to be transported to another State?

"The reason given for the rule that goods do not become an article of interstate commerce until actually put in motion for some place out of the State, or committed to the carrier for such transportation, is that, until that time, the article, though intended for exportation, may never be exported, as the owner has the perfect right to change his mind at any time. The common carrier has the same right to change his mind and ship on other cars than those which he may have provided for that purpose, and the cars which were intended for that purpose, may

never be used. The rule fixed by the Supreme Court in the one case seems equally applicable to the other. Applying that rule to the facts of this case, it would seem that the train for which the plaintiff company was indicted for running, was not, when so running, engaged in transporting articles of interstate commerce, and was, therefore, controlled exclusively by the laws of the State."

The principle enunciated in the Coe-Erroll case has been repeatedly approved by this Court in the following cases:

Turpin vs. Burgess, 117 U.S., 504, 507.

Morgan Co. vs. Louisiana, 118 U. S., 455, 465.

Smith vs. Alabama, 124 U. S., 5, 482.

Kidd vs. Pearson, 128 U. S., 1, 20.

Pullman Co. vs. Pennsylvania, 141 U. S., 18, 25.

Postal Tel. Co. vs. Adams, 155 U. S., 688, 698.

Adams Express Co. vs. Ohio, 165 U. S., 194.

American Ref. Trans. Co. vs. Hall, 174 U. S., 70.

Diamond Glue Co. vs. U. S. Glue Co., 187 U. S., 611, 616.

Diamond Match Co. vs. Ontonagon, 188 U. S., 82;

and followed in these:

U. S. vs. Boyer, 85 Fed., 432.
Cotting vs. Stock Yards Co., 82 Fed., 839, 844, s. c. 183 U. S., 79.
Chicago, St. Paul, etc. Ry. vs. Becker, 35 Fed., 883, 886.
Union Ref. & Trans. Co. vs. Lynch, 18 Utah, 378.
Winkley vs. Newton, 67 N. H., 80, 83.

The mere intention to make a commodity a subject of interstate commerce, does not, of itself, impress the article with that character.

This Court in Turpin vs. Burgess, 117 U. S., 504, 507, said:

> "How can the officers of the United States, or of the State, know that goods apparently part of the general mass, and not in course of exportation, will ever be exported? Will the mere word of the owner that they are intended for exportation make them exports? This cannot, for a moment, be contended. It would not be true and would lead to the greatest frauds. * * *
>
> In the present case the tax (if it was a tax) was laid upon the goods before they had left the factory. They were not in course of exportation; they might never be exported; whether they would be or not would depend altogether on the will of the manufacturer."

If property does not become impressed with an interstate character until it is loaded on cars and moved towards another State,—as held in the Coe-Erroll opinion,—certainly the vehicle by which it is transported ought, for like reason, not to become so until it is laden with interstate freight.

The true distinction between commerce itself and the instrumentalities which produce or transport it, was clearly stated by this Court in Kidd vs. Pearson, 128 U. S., 1, 20, as follows:

> "The legal definition of the term [commerce] as given by this Court in County of Mobile vs. Kimball, 102 U. S., 691, 702, is as follows: 'Commerce with foreign countries, and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation, and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities.' If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The re-

sult would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the northwest, and the cotton planter of the south, plant, cultivate, and harvest his crop with an eye on the prices at Liverpool, New York, and Chicago? The power being vested in Congress and denied to the States, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform, and vital interests —interests which in their nature are and must be, local in all the details of their successful management.

"It is not necessary to enlarge on, but only to suggest the impracticability of such a scheme, when we regard the multitudinous affairs involved, and the almost infinite variety of their minute details. * * *

"Even in the exercise of the power contended for, Congress would be confined to the regulation, not of certain branches of industry, however numerous, but to those

instances in each and every branch where the producer contemplated an interstate market. These instances would be almost infinite, as we have seen; but still there would always remain the possibility, and often it would be the case, that the producer contemplated a domestic market. In that case the supervisory power must be executed by the State; and the interminable trouble would be presented, that whether the one power or the other should exercise the authority in question would be determined, not by any general or intelligible rule, but by the secret and changeable intention of the producer in each and every act of production. A situation more paralyzing to the state governments and more provocative of conflict between the general government and the States, and less likely to have been what the framers of the Constitution intended, it would be difficult to imagine. * * *

" This court has already decided that the fact that an article was manufactured for export to another State does not *of itself* make it an article of interstate commerce within the meaning of Sec. 8, Art. 1, of the Constitution, and that the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce."

The Court then proceeds to quote at large from the Coe-Errol case and the case of The Daniel Ball, 10 Wal., 557, 565, in which latter case it was held that "whenever a commodity has begun to move, as an article of trade, from one State to another, commerce in that commodity between the States has commenced;" but this movement does not begin until the articles have been shipped or started for transportation from one state to the other.

So we say of this car. Until it actually became a part of a train that was employed in the movement of interstate traffic, it maintained its local character just as the freight, referred to in the Coe-Errol and Kidd-Pierson cases did. An illustration will point the distinction. Suppose that the Railway Company, after dropping this car at Promontory, had abandoned its use on its interstate or through trains, and used it only on local trains within the State of Utah: could it then be said to be an interstate car? Clearly not. Then why does not the argument that this Court so forcibly uses in the cases above referred to, viz.: that the fact that the owner or manufacturer of property intends it for exportation, does not give it the character of interstate traffic until it

is loaded on to cars or put in motion for that purpose, because he may, at any time, before that intention is carried out, change his mind, apply as well to the car in this case? It is either the destination of the contents of a car, or of the car itself, when in actual service, as a part of an interstate train, that gives it its character. For instance: if a train,—whose termini was in different states,—should pick up a car loaded with merchandise in one part of a state and haul it to its destination at a point within the same state, and an accident should occur to a brakeman while coupling or uncoupling the car to or from the train, because of the absence of automatic couplers, we do not believe that this Court would hold that the car was an interstate car within the purview of the Interstate Commerce Act, requiring cars engaged in interstate commerce to be equipped with such appliances, even though it were conceded that the car had, at some time, transported interstate freight, and, on this particular occasion, formed a part of an interstate train while being hauled between two points in the same state.

The distinction between the vehicle and commodity of commerce was noticed by Justice

STRONG in the State Tax on Railway Gross Receipts case, 15 Wal., 284, 294, as follows:

> "If the tax be upon the instrument, such as a stage coach, a railroad car, or a canal or steam-boat, its tendency is to increase the cost of transportation. Still it is not a tax upon transportation or upon commerce, and it has never been seriously doubted that such a tax may be laid."

It was likewise observed in Wiggins Ferry Co. vs. East St. Louis, 107 U. S., 365, 374, as follows:

> "In all of the cases just cited the right of a state to tax a ship owned by one of her citizens, and having its *situs* within the state, although used in foreign commerce, or in commerce between the states, was distinctly recognized. Thus, in Passenger Cases [7 Howard, 283] it was said by Mr. Justice MCLEAN: 'A state cannot regulate foreign commerce, but it may do many things which more or less affect it. It may tax a ship or other vessel used in commerce the same as other property owned by its citizens. A State may tax the stages in which the mail is transported, but this does not regulate the conveyance of the mail any

more than taxing a ship regulates commerce, and yet, in both instances, the tax on the property, in some degree, affects its use.' "

It seems to us that the only logical deduction from these authorities is that the character of the vehicle under consideration must be determined by the destination of the commodity with which it is burdened; or, if empty, the purpose for which the train, of which it forms a part, is being moved at the time of the alleged injury. In other words, it must either be loaded with interstate freight or actually be a part of a train which is moving on an interstate mission.

The mere *intention* to use an isolated car standing in a railroad yard for that purpose is insufficient to give it an interstate character. In order to impress it with such a character, it must either be loaded with interstate freight or actually form a part of an interstate train at the time the injury was inflicted, for the reasons stated in the authorities hereinbefore quoted that the mere determination of the mind to do a particular act is not tantamount to its accomplishment, and is too unsafe a guide for the law to follow. It is the accomplished act alone that is

recognized. This must necessarily be so for the reason that nearly every railroad car belonging to a trunk line is, at times, engaged in interstate traffic, and, at other times, only in local traffic. Let us illustrate again: If a brakeman was injured by a car that was loaded at the time with local freight, and constituted a part of a local train operating only in the state, this Court would certainly not hold that the statute under consideration applied to his case; yet, if that same car happened to be loaded with interstate freight and formed a part of a through train that was moving in a continuous voyage from one state to another, it certainly would. What, then, is it that gives the car its character? Is it not the destination of the commodity with which it is laden, or the fact that it is, at the time being, a part of a made-up interstate train? There is no inherent quality in the car itself that indicates its character; but, chameleon like, it changes its hue according to the use to which it is put at any particular time.

See the analogous ruling of this Court in Munn vs. Illinois, 94 U. S., 113, 135, where, in speaking of warehouses, it said:

"They are used as instruments by those

> engaged in state, as well as those engaged in interstate commerce, but they are no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another. Incidentally they may become connected with interstate commerce, but not necessarily so."

The intention to make the car in question a part of an interstate train might have been abandoned before that train reached Promontory; and, until it actually became a part of that train, its character was colorless. The fact that it had theretofore been used in that service, no more gave it the character of an interstate car than would the fact that an ordinary freight car had often been used in like service, but, at the time of the injury, happened to be loaded with local freight or attached to a local train, give it such a character.

Men's minds are so fickle and the events of life so uncertain that a mere unexecuted intention cannot form a reliable predicate for a legal conclusion any more than the harboring of a criminal intention can constitute a crime.

But plaintiff contends that this is a remedial

statute; and, therefore, invokes the well-known rule that such statutes are liberally construed so as to effectuate the intention of the law-makers. The difficulty in applying this rule to this statute—even if it were conceded that plaintiff's characterization of the statute is correct—is that it would contravene an equally well-known canon of construction—viz., that where a statute *creates* a liability, where none existed before, it must be strictly and literally construed.

Sutherland, in his work on Statutory Construction, Section 371, states this rule as follows:

> "If a statute creates a liability where otherwise none would exist, or increases a common-law liability, it will be strictly construed. A statute, even when it is remedial, must be followed with strictness, where it gives a remedy against a party who would not otherwise be liable. The courts will not extend or enlarge the liability by construction; they will not go beyond the clearly expressed provisions of the act."

It is not and cannot be successfully contended in this case that any duty to equip defendant's engine with automatic couplers existed at common law.

There are other reasons, however, why the construction contended for by plaintiff cannot prevail. Among them is the rule that when language is clear it needs no construction (Yerke vs. U. S., 173 U. S., 439; Thornley vs. U. S., 113 U. S., 310); and that words are to be construed according to their popular sense.

In speaking of a similar contention to that made by counsel in this case, this Court, in the case of Maillard vs. Lawrence, 16 How., 251, 261, said:

> "In instances in which words or phrases are novel or obscure, as in terms or [of] art, where they are peculiar or exclusive in their signification, it may be proper to explain or elucidate them by reference to the art or science to which they are appropriate; but if language which is familiar to all classes and grades and occupations—language, the meaning of which is impressed upon all by the daily habits and necessities of all, may be wrested from its established and popular import in reference to the common concerns of life, there can be little stability or safety in the regulations of society. Perhaps within the compass of the English language, and certainly within the popular comprehension with the inhabitants of this country, there can

scarcely be found terms, the import of which is better understood than is that of the words 'shawl' and 'wearing apparel,' or of 'shawl' as a familiar, every day and indispensable part of wearing apparel. And it would seem to be a most extravagant supposition which could hold that, in the enactment of a law affecting the interests of the nation at large the legislature should select for that purpose language by which the nation, or the mass of the people, must necessarily be misled. The popular or received import of words furnishes the general rule for the interpretation of public laws as well as of private and social transactions; and wherever the legislature adopts such language in order to define and promulge their action or their will, the just conclusion from such a course must be, that they not only themselves comprehended the meaning of the language they have selected, but have chosen it with reference to the known apprehension of those to whom the legislative language is addressed, and for whom it is designed to constitute a rule of conduct, namely, the community at large. If, therefore, the strange concession were admissible, that, in the opinion of a portion of the mercantile men, shawls were not considered wearing apparel, it would still re-

> main to be proved that this opinion was sustained by the judgment of the community generally, or that the legislature designed a departure from the natural and popular acceptation of language."

The word "car" is an ordinary one which can hardly admit of any misconstruction. There is no ambiguity whatever about it. It means and can mean but one thing, and that is a vehicle designed for the carrying of passengers or freight. Such is its common and popular import.

The word "engine" is equally as common, simple, and popular. Its use conveys to the common understanding a vehicle designed for propulsion, and not for the carrying of persons or property.

There might be a slight semblance of plausibility in the argument that Congress intended tc include engines in the word "car" used in this Act, if it were not for the fact that it employed both the expressions "engine" and "cars" in prescribing the equipment of each. The distinction between these two vehicles is plainly observed in the Act itself, both in its body and title. The Act provides for the equipment of *engines* with power *brakes* and of *cars*

with *automatic couplers.* It must be assumed that Congress was conscious of the fact that it was passing a penal statute when it adopted this Act, and that it knew that particularity and accuracy of expression are the chief requisites of such laws. If it had meant that engines were also to be equipped with automatic couplers it certainly would have said so.

In the case of Bryce vs. Burlington, &c., Ry. Co., 119 Iowa, 274, the Supreme Court of Iowa construed a similar statute according to our contention, saying at page 277:

> "Recurring again thereto, it is manifest that the words 'cars,' used in sections 2079, 2080 and 2082, were used alone advisedly, and for the purpose of distinguishing them from engines and their tenders, because section 2081 of this same act expressly provides for the equipment of all 'engines' with a 'proper and efficient power brake, commonly called a "driver brake",' and, if it had been the legislative intent to require engines to be equipped with automatic couplers in addition to the brake, it would have been so expressed in plain language.
>
> "At the time this statute was originally enacted, no action had been taken by Con-

gress requiring self-couplers and air brakes on all cars used in interstate commerce, and it was a matter of common knowledge that freight cars with all kinds of couplers and drawheads were in use on all of the railroads in the United States, and that cars belonging to the many different roads were widely scattered. Engines must be used in handling these foreign cars, and the increased danger and inconvenience of making a coupling where the engine or tender was automatically equipped and the car to which it was to be coupled was not was undoubtedly in the minds of the legislators. That the distinction which we have pointed out was clearly made and intended is manifested further by the language of sections 5 and 6 of the original act. Section 5 required railroad companies to 'include in their annual report to the state railroad commissioners the number of locomotive engines and cars used in this state, and what number is equipped with automatic power brakes and what number of cars equipped with automatic safety couplers, and the kind of brakes and couplers used.' Section 6 (2083 of the Code) provided that a railroad company 'operating a railroad in this state and using a locomotive engine, or running a train of

cars, or using any freight, way or other car contrary to the provisions of the four preceding sections shall be guilty of a misdemeanor,' the prohibited use of the engine clearly referring to the section requiring a power brake. The last section referred to provides that 'any railway employee who may be injured by the running of such engine * * * contrary to the provisions of said sections shall not be considered as waiving his right to recover damages by continuing in the employ of the company;' hence, if the statute were construed as contended for by the appellee, the question of the assumption of risk would be eliminated from the case. But we cannot so construe it, and, as there was evidence tending to support that claim of the appellant, there was prejudicial error in not instructing thereon, and in not directing the jury that the statute requiring cars to be provided with the automatic couplers did not apply to engines and their tenders."

The language of this Court in the case of Lake County vs. Rollins, 130 U. S., 662, 670, is peculiarly apposite to this case, viz.:

"We are unable to adopt the constructive interpolations ingeniously offered by counsel for defendant in error. Why not assume

that the framers of the constitution, and the people who voted it into existence, meant exactly what it says? At the first glance, its reading produces no impression of doubt as to the meaning. It seems all sufficiently plain; and in such case there is a well-settled rule which we must observe. The object of construction, applied to a constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself; and when the text of a constitutional provision is not ambiguous, the courts, in giving construction thereto, are not at liberty to search for its meaning beyond the instrument.

"To get at the thought or meaning expressed in a statute, a contract or a constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it.

Newell vs. People, 7 N. Y., 9, 97; Hills vs. Chicago, 60 Illinois, 86; Denn vs. Reid, 10 Pet., 524; Leonard vs. Wiseman, 31 Maryland, 201, 204; People vs. Potter, 47 N. Y., 375; Cooley, Const. Lim., 57; Story on Const., § 400; Beardstown vs. Virginia, 76 Illinois, 34. So, also, where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction. United States vs. Fisher, 2 Cranch, 358, 399, Doggett vs. Florida Railroad, 99 U. S., 72."

As the front of the engine was being coupled to this car (Rec., p. 14), no argument can be made on the theory that a *tender* is a car.

The injustice that the adoption of the construction of this Act claimed by plaintiff would work was recognized by this Court in the similar case of U. S. vs. Reese, 92 U. S., 214, 220, 221, wherein it was said:

"If the legislature undertakes to define, by statute, a new offense, and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know

with certainty when he is committing a crime. * * * The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined, is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only.

"It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would to some extent, substitute the judicial for the legislative department of the goverment."

The argument that engines are as much within the mischief, which this statute was intended to correct, as cars, and that it should, therefore, apply to them as well, is equally fallacious. It will be seen from the extracts hereinafter quoted from this Court's opinions in the cases of U. S. vs. Harris, 177 U. S., 309, and Sarlls

vs. U. S., 152 U. S., 575, the danger that lurks in expedients of that character. To them may be added the observations of this Court in the case of U. S. vs. Sheldon, 2 Wheat., 119, 122, as follows:

> "It may be admitted that the mischief is the same, whether the enemy be supplied with provisions in the one way or the other; but this affords no good reason for construing a penal law by equity, so as to extend it to cases not within the correct and ordinary meaning of the expressions of the law, particularly when it is confirmed by the interpretation which the legislature has given to the same expressions in the same law."

The plea that the policy of the government calls for a liberal construction of this Act does not aid the plaintiff in his contention, for this Court has said in the case of Hadden vs. The Collector, 5 Wall., 107, 111, that

> "What is termed the policy of the government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too

> unstable upon which to rest the judgment of the court in the interpretation of statutes."

And, in St. Paul, etc., Ry. vs. Phelps, 137 U. S., 528, 536,

> " * * * but where a statute, as in this case, is clear and free from all ambiguity, we think the letter of it is not to be disregarded in favor of a mere presumption as to what is termed the policy of the government, even though it may be the settled practice of the department."

That this Act was deficient in the particular mentioned is recognized by a legislative declaration of Congress, which, at its last session, and since the decision of this case in the Court below, passed a curative statute extending the scope of the Act so as to include engines as well as cars. See 32 Stats., 943, as follows:

> "AN ACT to amend an Act entitled 'An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving-wheel brakes and for other purposes,' approved March second, eighteen

hundred and ninety-three, and amended April first, eighteen hundred and ninety-six.

"BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That the provisions and requirements of the Act entitled 'An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving-wheel brakes, and for other purposes,' approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six, shall be held to apply to common carriers by railroads in the Territories and the District of Columbia, and shall apply in all cases, whether or not the couplers brought together are of the same kind, make or type; and the provisions and requirements hereof and of said acts relating to train brakes, automatic couplers, grab irons and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other loco-

motives, tenders, cars and similar vehicles used in connection therewith, excepting those trains, cars and locomotives exempted by the provisions of section six of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, or which are used upon street railways.

* * *

"SEC. 3. That the provisions of this Act shall not take effect until September first, nineteen hundred and three. Nothing in this Act shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any United States District Attorney from any of the provisions, powers, duties, liabilities, or requirements of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six; and all of the provisions, powers, duties, requirements and liabilities of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, shall, except as specifically amended by this Act, apply to this Act."

Approved, March 2, 1903.

No such legislation would have been necessary, if plaintiff's contention was well founded.

SECOND.

Neither the engine nor the dining car at the time of the injury to the plaintiff below were instruments of interstate commerce.

Whether an engine is an instrument of interstate commerce depends upon the character of the work in which it is engaged at the particular time in question. An engine does not transport or carry persons or property, but hauls cars which transport persons or property. The same test, therefore, is not used in determining whether an engine is an instrument of interstate commerce as is used in the case of a car. An engine is an instrument of interstate commerce if engaged in hauling cars loaded with passengers or merchandise coming from or destined to points in another State. The engine in the present case made a daily run between two points within the State of Utah. It never passed from one State to another, and was an instrument of interstate commerce solely while and entirely because it was hauling cars coming

from California and loaded with merchandise for Utah and other States. When the engine in question pulled into the station at Promontory, Utah, it was no doubt an instrument of interstate commerce, for the reason that it was then engaged in hauling cars loaded with goods which were on their way from San Francisco to Eastern points. Its character, however, as an instrument of interstate commerce by reason of the business in which it was engaged ceased the moment it was uncoupled from the freight train and was no longer engaged in such business. The work which it did after it was uncoupled, was the work which would have been done by a local switching engine at a station in a town of ordinary size. Promontory was a small place and no switching engine was located there. This freight engine when uncoupled from its train was used in place of a switching engine. It was employed in local work, which had no connection with interstate commerce. It was no more an instrument of interstate commerce than any local switching engine which never goes beyond the limits of the railroad yard. It was used to haul an empty dining car standing idle on a side track to a turn table in order that the car might be turned around.

As the character of the work in which an engine is engaged determines whether or not it is an instrument of interstate commerce, and as the engine in this case was engaged in doing the work of a local switching engine at the time the injury occurred, it would seem to be clear that so far as the engine itself is concerned, it was not an instrument of interstate commerce, and therefore did not come within the provisions of the Act of Congress, approved March 2, 1893.

A car is an instrument of interstate commerce if it is actually engaged in carrying persons or property coming from or destined to points in another State. A car in itself has no character either intrastate or interstate. It is, we take it, an instrument of interstate commerce even if it does not pass beyond the boundaries of a State, if it carries goods or passengers in the course of transportation from one State to another.

This is certainly the test established by Mr. Justice FIELD in the case of The Daniel Ball, 10 Wall., 557. There the steamboat plied up and down the Grand River entirely within the boundaries of the State of Michigan. It was, however, held that she was an instrument of interstate commerce because she carried goods brought from

another State and goods destined to another State, and it was held that the true criterion of whether a vehicle of commerce was an instrument of intrastate or interstate commerce was the character of the goods carried by it. It is difficult to see what better test could be applied. A car or a steamboat which carries no merchandise or passengers can hardly be said to be an instrument of commerce of any kind. If the car or steamboat carries only freight or passengers destined from one point in a State to another point in the same State, it certainly is not an instrument of interstate commerce even if the car or steamboat itself passes from one State to another. The sole question therefore is the character of the transportation in which the car is actually engaged and whether the persons or property then being carried are brought from or destined to points in another State. That is to say, before a car or steamboat can be said to be an instrument of interstate commerce, it must have on board of it persons or property received from or destined to points in another State. In the present case, the car was a passenger car, standing idle on a side-track, and having on board no passengers. It is true that it once had been engaged in inter-

state commerce, and an instrument of interstate commerce under the definition which we have given. It however lost its character as an instrument of interstate commerce as soon as it became idle and ceased to carry passengers.

In the case of Chicago, St. P., M. & O. Ry. Co. vs. Becker, 35 Fed. Rep., 883, 886, decided by Mr. Justice BREWER, when Circuit Judge, he declined to pass upon the question of whether a car which was loaded with goods bound for another State, and was being switched upon the side tracks of a station was an instrument of interstate commerce. He stated in his decision that his associate was of the opinion that a car so loaded, while being switched upon the side track in a station was not an instrument of commerce, but he himself did not find it necessary to decide the question.

The present case is of course far removed from the case cited. There the car was loaded with goods destined to another State. Therefore, under the definition given by Mr. Justice FIELD in the Daniel Ball case, it might well have been held to be an instrument of interstate commerce, but in the present case, the car in question was *not loaded* but was idle and had no passengers upon it, and

was not being switched for the purpose of then being made up into a train and passing out of the State.

It would seem to be clearly established under the evidence in this case and the decisions of this Court,

1. That the engine was at the time of the accident engaged in the performance of the duties of a local switch engine.

2. That the car was not then an instrument of interstate commerce, because it was standing empty and idle on a side track of a station yard.

3. That the engine was not an instrument of interstate commerce, because it necessarily took its character from the car to which it was coupled and the car in this case not being an instrument of interstate commerce therefore the engine could not be.

We respectfully submit that, under the peculiar circumstances of this case, neither the engine nor the car considered either separately or jointly could be said to have been engaged in interstate commerce or to have been instruments of interstate commerce at the time of the injury to the plaintiff below and therefore the fact that they were not equipped with automatic couplers, which

would couple with each other, did not constitute a violation of the Act of Congress, approved March 2, 1893.

THIRD.

Interstate Commerce Act Does Not Apply.

But, whatever the character of the car may be, there is a more cogent and conclusive reason for the Court's action in giving the peremptory charge to the jury in this case, and that is that the Interstate Commerce Act did not and could not apply to this case.

An examination of that Act will disclose the fact that it applies solely to the equipment of *cars* with automatic couplers and not the engines. Not only the title of the Act, but the Act itself, limits the requirement for couplers to the *cars*.

The first section of the Act provides for the equipment of the *engines* with power or train *brakes*, but nothing is said about couplers.

The second section provides

> "That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled, or used on its line, any *car* used in interstate traffic, not

> equipped with couplers, coupling automatically by impact, and which can be uncoupled without the necessity of men going between the *ends of the cars.*"

As the plaintiff was not injured between the ends of cars, but between the front end of an *engine* and a car, it is clear that the Interstate Commerce Act cannot apply to this accident.

As this is a penal statute (see Section 6), it must be strictly construed, and when such construction is given, it fails to reach plaintiff's case.

It is hardly necessary to cite authorities to support this last proposition, but, for sake of illustration, we will quote two.

In United States vs. Harris, 177 U. S., 305, 309, this Court held that "receivers" of railroads were not within the scope of the Act of Congress for the prevention of cruelty to animals by confining in cars and not feeding and watering every twenty-eight hours while in transit, viz.:

> "It must be admitted that, in order to hold the receivers, they must be regarded as included in the word 'company.' Only by a strained and artificial construction, *based chiefly upon a consideration of the mischief which the legislature sought to remedy*, can

receivers be brought within the terms of the law. *But can such a kind of construction be resorted to in enforcing a penal statute?* Giving all proper force to the contention of the counsel of the Government that there has been some relaxation on the part of the courts in applying the rule of strict construction to such statutes, it still remains that the intention of a penal statute must be found in the *language actually used*, interpreted according to its fair and obvious meaning. It is not permited to courts, in this class of cases, to attribute inadvertence or oversight to the legislature when enumerating the classes of persons who are subjected to a penal enactment, nor to depart from the settled meaning of words or phrases in order to bring persons not named or distinctly described within the supposed purpose of the statute."

In the case of Sarlls vs. U. S., 152 U. S., 570, 575, it was held that "lager beer" was not included in the designation "spiritous liquors," although it is generally known as an intoxicating beverage. The Court saying:

"Nor can courts, in construing penal statutes, safely disregard the popular signification of the terms employed, in order to bring acts, otherwise lawful, within the effect of such

statutes, because of a supposed public policy or purpose. The danger of substituting for the meaning of a penal statute, according to the popular and received sense, the conjecture of judges as to a supposed mischief to be corrected, is pointed out by Chief Justice MARSHALL, when in the case of U. S. vs. Wiltberger, 5 Wheat., 76, 96, he said: 'To determine that a case is within the intention of a statute, its language must authorize us to say so. *It would be dangerous*, indeed, to carry the principle that a case which is within the reason or mischief of a statute is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of a kindred character, with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule for other cases.'"

The evidence in this case, however, shows a complete compliance with the Interstate Commerce Act, as both plaintiff (Rec., p. 14) and his witness Rowland (Rec., p. 22), testified that the dining car was equipped with a Miller-hook coupler and the engine with a Janney coupler,

both of which were automatic devices for the coupling of cars in general use (Rec., p. 23).

As the Interstate Commerce Act does not prescribe the kind of coupler that shall be used on cars, any kind of coupler that possesses the automatic principle is a compliance with the Act. This conclusion is emphasized by the omission of Congress to prescribe any particular kind of coupler in the amendment of this Act, which was passed after the decision of this case, and after its attention had been called thereto by the Interstate Commerce Commission. See 16th Annual Report of Interstate Commerce Commission for 1902, p. 61.

This omission was, no doubt, intentional for the reasons stated by Judge SANBORN in his opinion in this case, viz.: that to have done so would necessarily have created a monopoly in the brand of coupler prescribed, a result which it has been the constant aim of this Goverment to avoid in all branches of trade and commerce.

The common law rule that a railroad brakeman assumes the risk of injury from coupling automatic couplers of different patterns still obtains and was not changed by this Statute. The reasons are well stated by Judge SANBORN, viz. (Rec., p. 42):

"For the reasons which have been stated this statute may not be lawfully extended by judicial construction beyond the fair meaning of its language. There is nothing in it which requires a common carrior engaged in interstate commerce to have every car on its railroad equipped with the same kind of coupling, or which requires it to have every car equipped with a coupler which will couple automatically with every other coupler with which it may be brought into contact in the usual course of business upon a great trans-continental system of railroad. If the law-makers had intended to require such an equipment it would have been easy for them to have said so, and the fact that they made no such requirement raises the legal presumption that they intended to make none. Nor is the reason for their omission to do so far to seek or difficult to perceive. There are several kinds or makes of practical and efficient automatic couplers. Some railroad companies use one kind, others have adopted other kinds. Couplers of each kind will couple automatically with others of the same kind or construction. But some couplers will not couple automatically with couplers of different construction. Railroad companies en-

gaged in interstate commerce are required to haul over their roads cars equipped with all these couplers. They cannot relieve themselves from this obligation or renounce this public duty for the simple reason that their cars or locomotives are not equipped with automatic couplers which will couple with those with which the cars of other roads are provided and which will couple with equal facility with those of their kind. These facts and this situation were patent to the Congress when it enacted this statute. It must have know the impracticability of providing every car with as many different couplers as it might meet upon a great system of railroads, and it made no such requirement. It doubtless knew the monopoly it would create by requiring every railroad company to use the same coupler, and it did not create this monopoly. The prohibition of the statute goes no farther than to bar the handling of a car 'not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the car.' It does not bar the handling and use of a car which will couple automatically with couplers of its kind because it will not also couple automatically with couplers of

all kinds, and it would be an unwarrantable extension of the terms of this law to import into it a provision to this effect. A car equipped with practical and efficient automatic couplers, such as the Janney couplers or the Miller hooks, which will couple automatically with those of their kind, fully and literally complies with the terms of the law, although these couplers will not couple automatically with automatic couplers of all kinds or constructions. The dining car and the locomotive were both so equipped. Each was provided with an automatic coupler which would couple with those of its kind as provided by the statute, although they would not couple with each other. Each was accordingly equipped as the statute directs, and the defendant was guilty of no violation of it by their use."

The occasion which called for the turning of this dining car was an emergency (Rec., pp. 21 and 22), which it would be unjust to hold defendant could not meet, without sending several hundred miles for a *passenger* engine, when a freight engine was close at hand, without incurring a penalty for an infraction of this law. The passenger car presumably was equipped with the kind of automatic coupler that was best

adapted to that service, and the freight engine was presumably equipped with an automatic coupler best adapted to that service. But whether they were or not, there is nothing in the old or new law that prevents the use of different kinds of couplers on passenger and freight trains. A Miller coupler might be admirably adapted for passenger service, yet be wholly unfit for the rougher freight service. So a Janney coupler might be better adapted for freight than passenger service.

As plaintiff himself testified (Rec., p. 14) that he had made hundreds of such Miller couplings, they must have been quite numerous on defendant's road; and, in view of the fact that the coupling that plaintiff was attempting to make was between a *freight* engine and a *passenger* car, it must be presumed that the car was equipped with such a coupler as was in use on passenger trains, and that the engine was equipped with such a coupler as was in use on freight trains.

As plaintiff's cause of action is predicated on this statute, it follows that the trial Court was correct in holding that he had failed to prove his case.

FOURTH.

Plaintiff assumed the risk of injury resulting from the use of couplers of different patterns.

The Courts of this country are unanimous in holding that the risk of injury that a brakeman incurs in coupling cars with couplers of different patterns is one that he assumes by virtue of his employment.

In speaking of the duty of railroad companies to handle cars with drawheads of unequal heights and the dangers and risks that brakemen necessarily incur and assume in coupling such cars, Judge COOLEY, of the Michigan Supreme Court, in one of the earliest cases on this subject (Ry. vs. Smithson, 45 Mich., 212, 220), said:

> "Moreover, the business of the road was of itself, a notification that many differences requiring attention in coupling were to be encountered by the switchmen and brakemen. The Michigan Central is a great commonway for the cars of all the railroad companies of the country, and every man in the employ of the defendant, if he has ordinary intelligence, is perfectly cognizant of the fact. He knows, too, that the cars of the several railroad and transportation com-

panies differ, and that at one time or another all these differences may appear in the cars he may be called upon to couple or uncouple. Every train is likely to have several kinds and he cannot assume as he passes from one to another that the two will be alike, much less that the whole train will be. To notify him specially of the differences would not only be troublesome and expensive and oftentimes, as above explained, confusing, but it would be a work of supererrogation; for any man capable intelligently of performing the duty would be no wiser after the notice than before, and a man who would not heed the information the very nature and course of the business would impart to him would be protected by no notice. The best notice is that which a man must of necessity see and which cannot confuse or mislead him; *he needs no printed placard to announce a precipice when he stands before it.*"

In Hodges vs. Kimball, 44 C. C. A., 193, appears a learned dissertation on the risks assumed by brakemen and the effect of their disregard of established rules. It has peculiar application to the case at bar, because of its kindred features.

The case of Whitcomb vs. Oil Co., 153 Ind., 513, 519, is on all fours with the case at bar, the injury there having occurred in substantially the same way as in the case at bar and the plaintiff's version of it corresponding almost precisely with the account given by the plaintiff in this case. The trial Court nonsuited the plaintiff on the ground that he assumed the risk, and its action was affirmed by the Supreme Court. The plaintiff admitted that

> "hundreds of cars belonging to various roads were handled every day. The cars differed in construction in many ways. There were different kinds of drawbars; some automatic, some with spring dogs, some without; some without buffers, some with buffers; and some with buffers set above the draw bar, some below and some on a level. The spring dog in a draw bar would hold the link out horizontally so that it would enter the drawhead of another car of like construction, and the spring dog of the other car would throw the pin into the link, and thus accomplish the coupling automatically. Those without the spring dog were coupled with a link and pin by hand. *A car with automatic device had to*

FIFTH.

Plaintiff's contributory negligence was such as to bar this action.

That the plaintiff fully appreciated the danger he incurred in making this coupling is conclusively shown by his own repeated admissions.

On p. 15 of Record, he says:

> "Yes, sir, I knew what the difficulty of the coupler was, because it was a Janney and a Miller and I most certainly knew it was a difficult coupler."
>
> "It was dangerous to go between those cars, but I was ordered to do it. I knew it was a dangerous coupler, but I was taking my time. I was trying three different times.
>
> "Q. I see you did. When you first went there did you see the condition it was in? A. I seen it was a Miller.
>
> "Q. And a Janney coupler? A. Yes, sir. * * * I went in the first time and failed and saw the difficulties when I did it, but I was supposed to couple it. * * * I gave the engineer the signals and he obeyed them by going and coming, and a second and third time I went in between those cars *knowing the danger*. I was not forced to go in any more than that. I knew the conse-

quences if I did not do the work as I was told to. *I was always instructed to protect myself, but didn't in this case*, because I was ordered to do that coupling."

The only evidence of any ordering was that the conductor told him to go over and turn this dining car around. He admitted that the conductor was not present when he was injured but had gone about doing his other work; that he, plaintiff, had sole charge of the movements of the engine; that the engineer obeyed his signals and that he was master of the situation, there being no superior in charge of or controlling him in making this coupling (Rec., pp. 17 and 20). On page 16 of record he said:

"A. Men lose their lives right along over the same thing.

"Q. That is what I asked you and what I understand you to deny. I asked you if it was dangerous to life for a man to go in there? A. I did not say this one was dangerous to life.

"Q. I am not talking about that. But going in between cars to make this coupling with a pin is dangerous to life or limb? A. It is.

"Q. And you knew that fact? A. I knew it.

"Q. And yet you tried to do this thing three times? A. Yes.

"Q. The only force that was used against you, as I understand you, was that you were instructed by the conductor to perform, to go and turn this car on the turntable? A. Yes sir.

"Q. No hurry about it and no worry about it? A. No sir."

See

San Antonio Traction Co. vs. De Rodriquez, 77 S. W., 420, 422.
Houston, &c., Ry. vs. Martin, 21 Tex. Civ. App., 207.

Plaintiff admitted that he was familiar with defendant's rule 59 and that he agreed to and studied the rules and regulations.

RULE 59.

This rule 59 declared that

"Great care must be exercised by all persons in coupling cars. Inasmuch as the couplers of cars and engines cannot be uniform in style or strength and are liable to be broken from various causes so as to render it dangerous to expose the hands, arms or persons of

those engaged in making couplings; all employes are enjoined before coupling cars or engines *to examine and to know the kind and condition* of the drawhead, drawbar, link, *coupling* apparatus and are forbidden to place in trains any car with a defective coupling until they *shall* have reported *the defect to the conductor or yardmaster.*" (Record, p. 9).

Plaintiff admitted that he did not report this alleged defect in the coupler to the conductor because it was so slight that he did not think it serious enough to report (Rec., pp. 15 and 18.)

With such admissions as these regarding his knowledge of the dangers of making this coupling, and of the rule just quoted, it is inconceivable how any Court could do otherwise than nonsuit the plaintiff, even if it had held that the defendant had not complied with the provisions of the Act of Congress of March 2, 1893.

In the case of Denver & R. G. R. Co. vs. Arrighi, 129 Fed. Rep., 347 (decided by the Circuit Court of Appeals for the Eighth Circuit, March 18, 1904), it appeared that the railroad company was a common carrier engaged in interstate commerce. The plaintiff was a switchman in the service of the railroad and was injured

while endeavoring to effect a coupling of two narrow-gauge freight cars, one of which was at the time employed in moving interstate traffic. Neither car was equipped with couplers coupling automatically. It therefore became necessary for the plaintiff to go between the ends of the cars in the performance of his duty. In making the coupling his hand was crushed. He brought suit against the railroad company and rested his right to recover solely upon the failure of the defendant to comply with the provisions of the Act of Congress of March 2, 1893, requiring cars used in moving interstate traffic to be equipped with couplers operating automatically. He recovered a judgment in the trial court, which was reversed by the Circuit Court of Appeals, upon the ground that the plaintiff had been guilty of contributory negligence in the manner in which he made the coupling. At page 348, the Court said:

> "Prior to the time when the Act of Congress became fully operative, the employees of a railroad company subject to its provisions, engaged in coupling cars used in moving interstate traffic, but not equipped with automatic couplers, assumed the ordinary

risks and hazards of that employment, and the company was not liable to them for injuries resulting therefrom. The common-law doctrine of the assumption of risk was then applicable. But a new rule is prescribed by the act. It specifically provides that the employees shall no longer rest under the burden of that assumption in respect of any car used contray to its provisions. *While this is true, the railroad company is not thereby deprived of the defense of contributory negligence.* With an exception, unnecessary to be noted here, the risks and dangers of an employment which at common law are assumed by the employee are not those which arise from the negligence of either party. And when the burden of those assumed risks and dangers were lifted from the employee by statutory enactment, and cast upon the railroad company, there was not transferred therewith a responsibility for the negligence of the employee himself. The rationale of the doctrine of assumption of risk is not that which supports the rule of contributory negligence. They operate differently and are dependent upon widely different principles. Railroad Co. vs. McDade, 24 Sup. Ct. 24, 48 L. Ed., 96; St. Louis Cordage Co. vs. Miller (C. C. A.) 126 Fed. 495.

> It cannot be assumed that by the passage of a salutory law designed for the protection of those engaged in a hazardous occupation Congress intended to offer a premium for carelessness, or to grant immunity from the consequences of negligence. *The reasonable conclusion is that the defense of contributory negligence is as available to a railroad company after as before the passage of the act of Congress, although it has not complied with its requirements.*"

In speaking of the conduct of a brakeman under similar conditions to those at bar the Supreme Court of Appeals of Virginia in the case of Norfolk, etc., Ry. vs. Emmert, 83 Va., 640, 645, said, quoting plaintiff's testimony:

> " * * * He saw, when he went to make the coupling, that the bumper was not in its right place, and tried to raise it; that it was loose in the collar; that all bumpers are loose in the collar; *but this was about two inches looser than usual;* that the wood had worn away, and this gave it play." (Then proceeding with the opinion.) * * * " It was the special duty of the defendant in error to have noticed the condition of the bumper when he uncoupled it from the train and to have reported it, if, in fact, it was out

of order, and not to attempt to couple cabooses of different heights with a straight link. It was his duty to observe the cars and their couplings, so as to determine, before attempting to couple them, what kind of a link should be used. The evidence clearly shows that the coupling should have been made with a crooked link, and the failure to observe the disparity in the heights of the drawheads, or the miscalculation of the defendant in error as to the necessity for the use of a crooked link to effect the coupling with, in safety, and his failure to use a crooked link for the operation, was negligence on the part of defendant in error, but for which the accident would not have occurred."

So in the case of Brooks vs. Ry., 47 Fed., 687, 688, it was said:

"The only charge of wrong on the part of the defendant upon which the claim for damages in this case rests is in this: that the engine with which the plaintiff was required to work in performing his duties as switchman was improperly constructed and unsuitable for use as a switch engine, the drawhead being so short that a coupling could not be effected without bringing the

tender and the car to be coupled so near together as to leave but an insufficient space for a person to operate safely in coupling them. The plaintiff in accepting employment from the defendant as a switchman in the yard in which this engine was used, must be held to have assumed the risk of all injuries to himself ordinarily incidental to that situation, including such as were liable to occur in consequence of any visible defect in the machinery and appliances supplied for use in connection with his work. *The alleged defect in this engine was visible*, and should have been, if it was not in fact, known to the plaintiff before he suffered the injury described in this complaint. He cannot be heard to say that he did not know of the existence of the defect, or that he could not discover it, for he must be regarded as having guaranteed to the defendant his own competency for the situation in which he was employed, which necessarily required the possession on his part of sufficient knowledge of locomotive engines, drawheads and coupling apparatus to be able *to recognize*, *upon seeing it*, a dangerous defect of the character described. One of the rules of the company, forming part of the contract which he entered into upon entering its ser-

vice, required the plaintiff to inspect and take notice of the style, construction and condition of the drawheads, links and pins to be used in coupling engines and cars. The plaintiff could not, therefore, have failed to see the drawhead which he claims was defective and unsuitable, in time to have avoided the injury without being guilty of gross negligence and breach of duty. *He controlled the engineer in moving the locomotive* towards the car which was to have been coupled, and he alone, if any one, was to blame for the sudden coming together of the two, whereby he was caught between them and crushed. To me it is too plain to admit of any doubt, that, by the plaintiff's showing it appears that the defendant could not have caused his injury in the manner alleged without such contributory negligence on his part as to preclude a recovery by him of any damages therefor, and it would be error for me to refuse to grant the present motion."

To the same effect is So. Ry. Co. vs. Arnold, 114 Ala., 183, 189, in which it was said:

"The plaintiff, as he himself shows, was experienced in coupling cars, and was familiar with the use of couplers such as were of the pattern used on the cars he

attempted to couple. They were, as he says, of a dangerous kind to couple without the exercise of great care; and that they were dangerous, the injury plaintiff received fully established. *Their danger was known to him, and the peril was obvious.* This called for the exercise of a higher than ordinary degree of care by him, in his attempt to couple them. * * * The injury resulted from plaintiff having placed his hand in a place where it was liable to be hurt, and not from the speed of the train. If he had acted cautiously in the presence of danger obvious to any one attempting to make a coupling under the circumstances and which was well known to him, he would not have been injured, whether the cars came back slowly or rapidly. We cannot do better than to state the rule of contributory negligence as applicable to the case, as Mr. Beach has done: 'The standard by which the plaintiff's negligence is to be measured, is the standard of ordinary care, and the rule is correctly and pertinently summed up in Cremer vs. Portland, by the Supreme Court of Wisconsin (36 Wis. 92): "If the plaintiff was guilty of any want of ordinary care and prudence (however slight), which neglect contributed directly to pro-

> duce the injury, he cannot recover. * * * It is not the law that slight negligence on the part of the plaintiff will defeat the action. * * * Not slight negligence, but any want, however *slight*, *of ordinary* care on the part of a plaintiff, is sufficient to defeat the action." Beach on Cont. Neg., Secs. 20, 21. We are forced to the conclusion that the plaintiff, under the facts before us, was guilty not only of a want of ordinary care to prevent the injury inflicted on him, but he was guilty of very great negligence, which contributed proximately to the injury he received."

The case of Cleary vs. Ry., 66 N. Y. Sup., 568, bears a striking analogy to the one at bar. The only points of difference being that Cleary was injured between two *cars*, while Johnson was injured between an engine and car, and Cleary had only a second or two to exercise his judgment, while plaintiff had unlimited time and the advantage of seeing the effect of two unsuccessful efforts to make the coupling. So the odds were greatly in Johnson's favor.

Yet the Court in the Cleary case affirmed the action of the trial Court in nonsuiting the plaintiff on account of his contributory negligence.

In distinguishing the Cleary case from one relied upon by his counsel the Court said at p. 572:

> "It will be seen that the cause of the accident in that case was the passing of one bumper under the other, and that this danger was one not observed by the plaintiff until it was too late to recede from his dangerous position, and as said in the opinion, the whole transaction was the occurrence of a moment, and the error of the plaintiff was in estimating the danger that confronted him. Here, however, the danger to be apprehended was apparent to the plaintiff; and that he realized it was shown by his statement that he thought that, with care, he could successfully accomplish the task. The distinction between the two cases is that in the Goodrich case the injury resulted from a cause that was unexpected and unforeseen until too late to avert it, while in this case the injury resulted from a cause which was not unexpected but which plaintiff thought he could surmount by the exercise of care. Had he not assumed the risk of placing his hand and arm in a dangerous position, no injury could have happened to him because in this case he was perfectly safe between the cars, the accident being caused, not by

one bumper passing under the other, but by the plaintiff's effort to raise the link in the drawhead of the moving car into the drawhead of the stationary car which was some inches higher. * * * Apart, therefore, from the question of the defendant's negligence, which we have discussed, but not decided, we think that the inference could not reasonably be drawn that the plaintiff was free from contributory negligence. * * * We think, therefore, that the disposition made by the trial judge in dismissing the complaint was right, and that the judgment appealed from should be affirmed with costs. All concur."

As plaintiff admitted he had been furnished with written rules by the company and had read and was familiar with them, his breach thereof precluded him from recovering for his injuries.

Fluhrer vs. Ry., 121 Mich., 212;
Platton vs. So. Ry., 49 C. C. A., 571;
Erie Ry. vs. Kane, 55 C. C. A., 129.

See also K., etc., Ry. vs. Dye, 16 C. C. A., 604, 608, in which it was said:

"There is no pretense that the requirements of the rules were observed by the section foreman in charge of the hand car. It is indisputable that *their non-observance*

contributed to, if it did not occasion the accident, and *even if the defendant was guilty of negligence*—a question upon which it is not necessary we should express an opinion—the section foreman was clearly guilty of contributory negligence, which precludes a recovery in this case, and *the Court below should have so told the jury*."

We, therefore, respectfully submit that the plaintiff was guilty of contributory negligence in not reporting to the conductor in compliance with the provisions of Rule 59 of the Railroad Company, that the coupler on the car was defective, and that such contributory negligence was sufficient to defeat recovery by the plaintiff in this case, even though this court should hold that the defendant below had not conformed to the requirements of the Act of Congress of March 2, 1893.

SIXTH.

The judgment of the Court below should be affirmed.

MAXWELL EVARTS,
MARTIN L. CLARDY,
HENRY G. HERBEL,
Of Counsel for Respondent and Defendant in Error.

Supreme Court of the United States.

Nos. 32 and 87.—October Term, 1904.

32	W. O. Johnson, Petitioner, *vs.* Southern Pacific Company.	On writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.
87	W. O. Johnson, Plaintiff in Error, *vs.* Southern Pacific Company.	In error to the United States Circuit Court of Appeals for the Eighth Circuit.

[December 19, 1904.]

Johnson brought this action in the District Court of the First Judicial District of Utah against the Southern Pacific Company to recover damages for injuries received while employed by that company as a brakeman. The case was removed to the Circuit Court of the United States for the District of Utah by defendant on the ground of diversity of citizenship.

The facts were briefly these: August 5, 1900, Johnson was acting as head brakeman on a freight train of the Southern Pacific Company, which was making its regular trip between San Francisco, California, and Ogden, Utah. On reaching the town of Promontory, Utah, Johnson was directed to uncouple the engine from the train and couple it to a dining car, belonging to the company, which was standing on a side track, for the purpose of turning the car around preparatory to its being picked up and put on the next west-bound passenger train. The engine and the dining car were equipped, respectively, with the Janney coupler and the Miller hook, so called, which would not couple together automatically by impact, and it was, therefore, necessary for Johnson, and he was ordered, to go between the engine and the dining car, to accomplish the coupling. In so doing Johnson's hand was caught between the engine bumper and the dining car bumper, and crushed, which necessitated amputation of the hand above the wrist.

On the trial of the case, defendant, after plaintiff had rested, moved the court to instruct the jury to find in its favor, which motion was granted, and the jury found a verdict accordingly, on which judgment was entered. Plaintiff carried the case to the Circuit Court of Appeals for the Eighth Circuit and the judgment was affirmed. 117 Fed. Rep. 462.

Mr. Chief Justice Fuller delivered the opinion of the Court:

This case was brought here on certiorari, and also on writ of error, and will be determined on the merits, without discussing the question of juris-

diction as between the one writ and the other. *Pullman Car Company* v. *Transportation Company*, 171 U. S. 138, 145.

The plaintiff claimed that he was relieved of assumption of risk under common law rules by the act of Congress of March 2, 1893, (27 Stat. 531, c. 196), entitled "An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving wheel brakes, and for other purposes."

The issues involved questions deemed of such general importance that the Government was permitted to file brief and be heard at the bar.

The act of 1893 provided:

"That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system. . . .

"SEC. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

"SEC. 6. That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the District Court of the United States having jurisdiction in the locality where such violation shall have been committed, and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred." . . .

"SEC. 8. That any employe of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge."

The Circuit Court of Appeals held, in substance, Sanborn, J., delivering the opinion and Lochren, J., concurring, that the locomotive and car were both equipped as required by the act, as the one had a power driving wheel brake and the other a coupler; that section 2 did not apply to locomotives; that at the time of the accident the dining car was not "used in moving interstate traffic;" and, moreover, that the locomotive, as well as the dining car, was furnished with an automatic coupler, so that each was equipped as the statute required if section 2 applied to both. Thayer, J., concurred in the judgment on the latter ground, but was of opinion that

locomotives were included by the words "any car" in the second section, and that the dining car was being "used in moving interstate traffic."

We are unable to accept these conclusions, notwithstanding the able opinion of the majority, as they appear to us to be inconsistent with the plain intention of Congress, to defeat the object of the legislation, and to be arrived at by an inadmissible narrowness of construction.

The intention of Congress, declared in the preamble and in sections one and two of the act, was "to promote the safety of employees and travellers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes," those brakes to be accompanied with "appliances for operating the train-brake system;" and every car to be "equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars," whereby the danger and risk consequent on the existing system was averted as far as possible.

The present case is that of an injured employee, and involves the application of the act in respect of automatic couplers, the preliminary question being whether locomotives are required to be equipped with such couplers. And it is not to be successfully denied that they are so required if the words "any car" of the second section were intended to embrace, and do embrace, locomotives. But it is said that this cannot be so because locomotives were elsewhere in terms required to be equipped with power driving-wheel brakes, and that the rule that the expression of one thing excludes another applies. That, however, is a question of intention, and as there was special reason for requiring locomotives to be equipped with power driving-wheel brakes, if it were also necessary that locomotives should be equipped with automatic couplers, and the word "car" would cover locomotives, then the intention to limit the equipment of locomotives to power driving-wheel brakes, because they were separately mentioned, could not be imputed. Now it was as necessary for the safety of employees in coupling and uncoupling, that locomotives should be equipped with automatic couplers, as it was that freight and passenger and dining cars should be, perhaps more so, as Judge Thayer suggests, "since engines have occasion to make couplings more frequently."

And manifestly the word "car" was used in its generic sense. There is nothing to indicate that any particular kind of car was meant. Tested by context, subject matter and object, "any car" meant all kinds of cars running on the rails, including locomotives. And this view is supported by the dictionary definitions and by many judicial decisions, some of them having been rendered in construction of this act. *Winkler* v. *Philadelphia and Reading Railway Company*, 53 Atl. Rep. 70; 4 Penn. (Del.) 387; *Fleming* v. *Southern Railway Company*, 131 N. C. 476; *East St. Louis*

Connecting Railway Company v. *O'Hara*, 150 Ill. 580; *Kansas City &c. Railroad Company* v. *Crocker*, 95 Ala. 412; *Thomas* v. *Georgia Railroad and Banking Company*, 38 Ga. 222; *New York* v. *Third Ave. Ry. Co.*, 117 N. Y. 404; *Benson* v. *Railroad Company*, 75 Minn. 163.

The result is that if the locomotive in question was not equipped with automatic couplers, the company failed to comply with the provisions of the act. It appears, however, that this locomotive was in fact equipped with automatic couplers, as well as the dining car, but that the couplers on each, which were of different types, would not couple with each other automatically by impact so as to render it unnecessary for men to go between the cars to couple and uncouple.

Nevertheless, the Circuit Court of Appeals was of opinion that it would be an unwarrantable extension of the terms of the law to hold that where the couplers would couple automatically with couplers of their own kind, the couplers must so couple with couplers of different kinds. But we think that what the act plainly forbade was the use of cars which could not be coupled together automatically by impact, by means of the couplers actually used on the cars to be coupled. The object was to protect the lives and limbs of railroad employees by rendering it unnecessary for a man operating the couplers to go between the ends of the cars, and that object would be defeated, not necessarily by the use of automatic couplers of different kinds, but if those different kinds would not automatically couple with each other. The point was that the railroad companies should be compelled, respectively, to adopt devices, whatever they were, which would act so far uniformly as to eliminate the danger consequent on men going between the cars.

If the language used were open to construction, we are constrained to say that the construction put upon the act by the Circuit Court of Appeals was altogether too narrow.

This strictness was thought to be required because the common law rule as to the assumption of risk was changed by the act, and because the act was penal.

The dogma as to the strict construction of statutes in derogation of the common law only amounts to the recognition of a presumption against an intention to change existing law, and as there is no doubt of that intention here, the extent of the application of the change demands at least no more rigorous construction than would be applied to penal laws. And, as Chief Justice Parker remarked, conceding that statutes in derogation of the common law are to be construed strictly, "they are also to be construed sensibly, and with a view to the object aimed at by the legislature." *Gibson* v. *Jenney*, 15 Mass. 205.

The primary object of the act was to promote the public welfare by securing the safety of employees and travellers, and it was in that aspect

remedial, while for violations a penalty of one hundred dollars, recoverable in a civil action, was provided for, and in that aspect it was penal. But the design to give relief was more dominant than to inflict punishment, and the act might well be held to fall within the rule applicable to statutes to prevent fraud upon the revenue, and for the collection of customs, that rule not requiring absolute strictness of construction. *Taylor* v. *United States*, 3 How. 197; *United States* v. *Stowell*, 133 U. S. 1, 12, and cases cited. And see *Farmers' National Bank* v. *Deering*, 91 U. S. 29, 35; *Gray* v. *Bennett*, 3 Met. (Mass.) 539.

Moreover it is settled that "though penal laws are to be construed strictly, yet the intention of the legislature must govern in the construction of penal as well as other statutes; and they are not to be construed so strictly as to defeat the obvious intention of the legislature." *United States* v. *Lacher*, 134 U. S. 624. In that case we cited and quoted from *United States* v. *Winn*, 3 Sumn. 209, in which Mr. Justice Story, referring to the rule that penal statutes are to be construed strictly, said:

"I agree to that rule in its true and sober sense; and that is, that penal statutes are not to be enlarged by implication, or extended to cases not obviously within their words and purport. But where the words are general, and include various classes of persons, I know of no authority, which would justify the court in restricting them to one class, or in giving them the narrowest interpretation, where the mischief to be redressed by the statute is equally applicable to all of them. And where a word is used in a statute, which has various known significations, I know of no rule, that requires the court to adopt one in preference to another, simply because it is more restrained, if the objects of the statute equally apply to the largest and broadest sense of the word. In short, it appears to me, that the proper course in all these cases, is to search out and follow the true intent of the legislature, and to adopt that sense of the words, which harmonizes best with the context, and promotes in the fullest manner, the apparent policy and objects of the legislature."

Tested by these principles, we think the view of the Circuit Court of Appeals, which limits the second section to merely providing automatic couplers, does not give due effect to the words "coupling automatically by impact, and which can be uncoupled without the necessity of men going between the cars," and cannot be sustained.

We dismiss as without merit the suggestion, which has been made, that the words "without the necessity of men going between the ends of the cars," which are the test of compliance with section two, apply only to the act of uncoupling. The phrase literally covers both coupling and uncoupling, and if read, as it should be, with a comma after the word "uncoupled," this becomes entirely clear. *Chicago, Milwaukee & St. Paul Railway Company* v. *Voelker*, 129 Fed. Rep. 522; *United States* v. *Lacher*, *supra*.

The risk in coupling and uncoupling was the evil sought to be remedied, and that risk was to be obviated by the use of couplers actually coupling

automatically. True, no particular design was required, but whatever the devices used they were to be effectively interchangeable. Congress was not paltering in a double sense. And its intention is found "in the language actually used, interpreted according to its fair and obvious meaning." *United States* v. *Harris*, 177 U. S. 309.

That this was the scope of the statute is confirmed by the circumstances surrounding its enactment, as exhibited in public documents to which we are at liberty to refer. *Binns* v. *United States*, 194 U. S. 486, 495; *Holy Trinity Church* v. *United States*, 143 U. S. 457, 463.

President Harrison, in his annual messages of 1889, 1890, 1891 and 1892, earnestly urged upon Congress the necessity of legislation to obviate and reduce the loss of life and the injuries due to the prevailing method of coupling and braking. In his first message he said: "It is competent, I think, for Congress to require uniformity in the construction of cars used in interstate commerce, and the use of improved safety appliances upon such trains. Time will be necessary to make the needed changes, but an earnest and intelligent beginning should be made at once. It is a reproach to our civilization that any class of American workmen should, in the pursuit of a necessary and useful vocation, be subjected to a peril of life and limb as great as that of a soldier in time of war."

And he reiterated his recommendation in succeeding messages, saying in that for 1892: "Statistics furnished by the Interstate Commerce Commission show that during the year ending June 30, 1891, there were forty-seven different styles of car couplers reported to be in use, and that during the same period there were 2,660 employees killed and 26,140 injured. Nearly 16 per cent of the deaths occurred in the coupling and uncoupling of cars, and over 36 per cent of the injuries had the same origin."

The Senate report of the first session of the Fifty-second Congress, (No. 1049,) and the House report of the same session, (No. 1678,) set out the numerous and increasing casualties due to coupling, the demand for protection, and the necessity of automatic couplers, coupling interchangeably. The difficulties in the case were fully expounded and the result reached to require an automatic coupling by impact so as to render it unnecessary for men to go between the cars, while no particular device or type was adopted, the railroad companies being left free to work out the details for themselves, ample time being given for that purpose. The law gave five years, and that was enlarged, by the Interstate Commerce Commission as authorized by law, two years, and subsequently seven months, making seven years and seven months in all.

The diligence of counsel has called our attention to changes made in the bill in the course of its passage, and to the debates in the Senate on the report of its committee. (24 Cong. Rec., pt. 2, pp. 1246, 1273 *et seq.*) These demonstrate that the difficulty as to interchangeability was fully in

the mind of Congress and was assumed to be met by the language which was used. The essential degree of uniformity was secured by providing that the couplings must couple automatically by impact without the necessity of men going between the ends of the cars.

In the present case the couplings would not work together, Johnson was obliged to go between the cars, and the law was not complied with.

March 2, 1903, (32 Stat. 943, c. 976,) an act in amendment of the act of 1893 was approved, which provided, among other things, that the provisions and requirements of the former act "shall be held to apply to common carriers by railroads in the Territories and the District of Columbia and shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type;" and "shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce."

This act was to take effect September first, nineteen hundred and three, and nothing in it was to be held or construed to relieve any common carrier "from any of the provisions, powers, duties, liabilities, or requirements" of the act of 1893, all of which should apply except as specifically amended.

As we have no doubt of the meaning of the prior law, the subsequent legislation cannot be regarded as intended to operate to destroy it. Indeed, the latter act is affirmative, and declaratory, and, in effect, only construed and applied the former act. *Bailey* v. *Clark*, 21 Wall. 284; *United States* v. *Freeman*, 3 How. 556; *Cope* v. *Cope*, 137 U. S. 682; *Wetmore* v. *Markoe*, *ante*, . This legislative recognition of the scope of the prior law fortifies and does not weaken the conclusion at which we have arrived.

Another ground on which the decision of the Circuit Court of Appeals was rested remains to be noticed. That court held by a majority that as the dining car was empty and had not actually entered upon its trip, it was not used in moving interstate traffic, and hence was not within the act. The dining car had been constantly used for several years to furnish meals to passengers between San Francisco and Ogden, and for no other purpose. On the day of the accident the eastbound train was so late that it was found that the car could not reach Ogden in time to return on the next westbound train according to intention, and it was therefore dropped off at Promontory to be picked up by that train as it came along that evening.

The presumption is that it was stocked for the return, and as it was not a new car, or a car just from the repair shop, on its way to its field of labor, it was not "an empty," as that term is sometimes used. Besides, whether cars are empty or loaded, the danger to employees is practically the same, and we agree with the observation of District Judge Shiras in *Voelker* v. *Railway Company*, 116 Fed. Rep. 867, that "it cannot be true that on the east-

ern trip the provisions of the act of Congress would be binding upon the company, because the cars were loaded, but would not be binding upon the return trip, because the cars are empty."

Counsel urges that the character of the dining car at the time and place of the injury was local only and could not be changed until the car was actually engaged in interstate movement or being put into a train for such use, and *Coe* v. *Errol*, 116 U. S. 517, is cited as supporting that contention. In *Coe* v. *Errol* it was held that certain logs cut in New Hampshire, and hauled to a river in order that they might be transported to Maine, were subject to taxation in the former State before transportation had begun.

The distinction between merchandise which may become an article of interstate commerce, or may not, and an instrument regularly used in moving interstate commerce, which has stopped temporarily in making its trip between two points in different States, renders this and like cases inapplicable.

Confessedly this dining car was under the control of Congress while in the act of making its interstate journey, and in our judgment it was equally so when waiting for the train to be made up for the next trip. It was being regularly used in the movement of interstate traffic and so within the law.

Finally it is argued that Johnson was guilty of such contributory negligence as to defeat recovery, and that, therefore, the judgment should be affirmed. But the Circuit Court of Appeals did not consider this question, nor apparently did the Circuit Court, and we do not feel constrained to inquire whether it could have been open under § 8, or, if so, whether it should have been left to the jury under proper instructions.

The judgment of the Circuit Court of Appeals is reversed; the judgment of the Circuit Court is also reversed, and the cause remanded to that court with instructions to set aside the verdict and award a new trial.

True copy.

Test:

Clerk Supreme Court, U. S.